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SUPREME COURT, U.S.
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No. 337

In the Supreme Court of the United States

October Term, 1959

ST. JOHNS MOTOR EXPRESS CO.,
JAMES J. WILLIAMS, INC., and
CONSOLIDATED FREIGHTWAYS, INC.,
Appellants,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court for the District of Oregon.

JURISDICTIONAL STATEMENT

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In the Supreme Court
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ST. JOHNS MOTOR EXPRESS CO.,
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v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court for the District of Oregon.

JURISDICTIONAL STATEMENT

The Appellants, St. Johns Motor Express Co., James J. Williams, Inc., and Consolidated Freightways, Inc. (hereinafter "the Appellants"), appeal from the judgment of the United States District Court for the District of Oregon, entered April 27, 1959, sustaining and confirming orders of the Interstate Commerce Commission (hereinafter "the Commission"), and submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the three-judge district court for the District of Oregon, filed April 27, 1959, is as yet unreported. A copy of the opinion is set forth in Appendix A hereto.

The Commission's report which gave rise to the Court's order sustaining and confirming it was entered in proceedings entitled Everts' Commercial Transport, Inc., Extension—Richmond, and is printed at 78 M.C.C. 717.

JURISDICTION

This suit was brought under 28 U.S.C. 1336 to set aside and enjoin enforcement of the Commission's final orders in the above-described proceeding. The judgment of the District Court was entered April 27, 1956, and the Appellant's Notice of Appeal was filed in the District Court on June 24, 1959.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. 1253 and 2101(b), and is sustained by the following cases: *American Trucking Assns. v. United States*, 344 U.S. 298; *Frozen Food Express v. United States*, 351 U.S. 40; *East Texas Motor Freight Lines v. Frozen Food Express*, 351 U.S. 49.

QUESTIONS PRESENTED

1. Must the Interstate Commerce Commission consider, give weight to, make findings and discuss the National Transportation Policy, in public convenience and necessity proceedings, with respect to whether the proposed additional operating authorities, upon the evidence of record in each proceeding, would impair the ability to existing carriers to maintain a safe, adequate economical and efficient service?

2. Is it a violation of the due process clause of the Constitution of the United States for the Interstate Commerce Commission in deciding a proceeding to predicate findings and conclusions upon evidence not of record in the subject proceeding?

3. May the Interstate Commerce Commission in deciding a proceeding alter its established standards of public convenience and necessity without advising protesting carriers of its alteration of such standards?

4. May the Interstate Commerce Commission make findings and conclusions not supported by substantial evidence of record?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The National Transportation Policy (49 U.S.C., preceding Section 1); Section 207(a) of the Interstate Commerce Act (49 U.S.C. 307); the Fifth Amendment to the Constitution of the United States; and 5 U.S.C. Sections 1002, 1004, 1006, 1007.

STATEMENT

On the 3d day of January, 1956, Everts' Commercial Transport, Inc., filed its application with the Interstate Commerce Commission for a certificate of public convenience and necessity to transport acids, chemicals and chemical solutions between points in Oregon, Washington and California and from points in California, Oregon and Washington to points in Idaho. The Commission assigned to such proceeding its docket number MC 25643, Sub 41. Hearing therein was held in Portland, Oregon, on May 3d and 4th, 1956.

On the 21st day of November, 1955, Inland Petroleum Transportation Company, Inc., filed with the Commission an application for a certificate of public convenience and necessity to transport acids, chemicals and chemical solutions in bulk by motor truck between points in California, Idaho, Montana, Oregon and Washington. The Commission assigned to such proceeding its docket number MC-88161, Sub 48, and the same was heard at Seattle, Washington, May 7, 1956 to and including May 12, 1956.

Each such application was denied by the hearing Examiner. Each applicant filed exceptions. These exceptions resulted in Division 1 of the Commission reversing the Examiner in each proceeding, and the grant of authority to each applicant. These Appellants and other interested parties filed petitions for reconsideration with the Commission. The Commission subsequently, and on January 19, 1959, finally decided the two identified

dockets in conjunction with nine other separate applications by one decision, which is reported in 78 M.C.C. 717.

Shortly thereafter, Appellant St. Johns Motor Express Co. instituted this proceeding in the United States District Court for the District of Oregon, and the other two Appellants were subsequently permitted to intervene.

Appellants contended before the three-judge court that there was no substantial evidence to support the Commission's findings of public convenience and necessity, which contention was recognized by the three-judge court. However, the appellants also contended in effect (1) that the Commission must consider, give weight to, make findings and discuss the National Transportation Policy, in public convenience and necessity proceedings, with respect to whether the proposed additional operating authorities, upon the evidence of record in each proceeding, would impair the ability of existing carriers to maintain a safe, adequate, economical and efficient service; (2) that it is a violation of the due process clause of the Constitution of the United States for the Interstate Commerce Commission in deciding a proceeding to predicate findings and conclusions upon evidence not of record in the subject proceeding; and (3) that the Interstate Commerce Commission in deciding a proceeding may not alter its established standards of public convenience and necessity without advising protesting carriers of its alteration of such standards.

The three-judge court apparently gave no cognizance or attention to the latter three contentions, see Appendix A.

THE QUESTIONS ARE SUBSTANTIAL

This is a case of first impression in this Court, insofar as the first question presented is concerned. While this Court has heretofore held that all relevant factors of the National Transportation Policy must at least be considered by the Interstate Commerce Commission in every proceeding, this Court has never, to our knowledge, ruled upon the specific question as to whether as a condition precedent to granting additional operating authority the Commission must consider, give weight to, and make findings as to whether the grant of such additional operating authority will impair the ability of existing carriers to maintain a safe, adequate, economical, and efficient service.

As will appear, infra, this Court has specifically held that

(a) Due process requires regulatory commissions to predicate findings and conclusions only upon matters of record, and

(b) Agencies may from time to time change their standards, but a party relying upon previously established standards should have an opportunity to meet revised standards if, without notice, the agency determines upon new and altered standards.

However, this Court has never, to our knowledge, passed upon these questions in the context which we have here. It would appear that both the Commission and the Court either (a) failed to correctly interpret this Court's

decisions on the latter two questions, or (b) ignored this Court's decisions relative thereto.

The proper resolution of the first question is of vital significance to the entire transportation industry and to the general public in that the existing transportation system cannot be sound and economical, and continue to exist, if no heed is to be given to the Congressional directive that a sound and economic transportation system shall be maintained, as voiced in the National Transportation Policy.

The National Transportation Policy specifies that the purpose of the Interstate Commerce Act, in part, is:

> " * * * to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers."

However, the Commission in the proceeding made no finding as to whether the grant of the additional authorities would, or would not, have any effect upon the existing transportation system. It ignored the subject.

This Court in *Schaffer Transportation Co., et al, v. U. S.*, 355 U.S. 83 stated at page 85:

> "The National Transportation Policy formulated by Congress, specifies in its terms that it is to govern the Commission in the administration and enforcement of all provisions of the Act, and this Court has made it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured. *Dixie Carriers, Inc. v. United States*, 351 U.S. 56; *Eastern-Central Motor Carriers Ass'n. v. United States*, 321 U.S. 194; *McLean Trucking Co. v. United States*, 321 U.S. 67. Of course, the Commission possessed a

'wide range of discretionary authority' in determining whether the public interest warrants certification of any particular proposed service. *United States v. Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241; *Interstate Commerce Commission v. Parker*, 326 U.S. 60. But that discretion must be exercised in conformity with the declared policies of the Congress. To see whether those policies have been implemented we look to the Commission's own summary of the evidence, and particularly to the findings, formal or otherwise, which the Commission has made. *Just as we would overstep our duty by undertaking to evaluate the evidence according to our own notions of the public interest, we would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation had been made in accordance with the mandate of Congress.*" (emphasis supplied)

This Court has similarly held that all relevant factors of the National Transportation Policy must at least be considered by the Commission. *American Trucking Association v. United States*, 344 U.S. 313-314; *King v. United States*, 344 U.S. 254, 263-264; *Alabama G. S. R. Co. v. United States*, 340 U.S. 419, 434-436; *United States v. Rock Island Co.*, 340 U.S. at 226-228.

The Interstate Commerce Commission is a creature of statute. This Court has repeatedly held, that the Commission must make clear findings of each element essential to the exercise of power. *North Carolina v. United States*, 325 U.S. 507; *United States v. Chicago, Milwaukee, St. P & P*, 294 U.S. 499, 510, 511; *Interstate Commerce Commission v. New York Central*, 222 U.S. 506.

The Commission itself has recognized the pertinency of its need to discuss the existing services in many cases. For example, in *Smith & Solomon Trucking Co., Extension—Camden*, 61 M.C.C. 748, it held at page 752:

> "There is one other aspect of this type of case which requires consideration. *The declared transportation policy requires us to foster sound economic conditions in transportation.* We are required, therefore, to consider among other things the effect of the injection of a new carrier, without proof of public need, *on the existing competitive situation in the considered territory.* In the absence of inadequacy of existing service, to permit a carrier to follow individual traffic which he controls can create a potential competition for existing carriers which is dangerous. *In every extension application we must look to the existing transportation scheme and determine what effect, if any, an extension will have on present facilities and operating authorities.* We may not, within our present powers, refuse to recognize the rights of existing carriers already operating in the considered area." (emphasis ours)

This holding was upheld in *Smith & Solomon Trucking Co. v. United States*, 120 Fed. Supp. 277, where it was stated:

> " * * * The national transportation policy which the Commission had very much in mind and which is of vital importance in any decision on the instant type of transportation problem does make it mandatory on the Commission, as the latter states, 'to foster sound economic conditions in transportation.' By reason of that policy itself the Commission must carefully weigh the entire relevant situation. * * * "

It may be that the Commission will urge here that it could have made the required finding of non-impairment of existing services. We do not concede this. But it

would appear immaterial at this stage. In *Securities & Exchange Commission v. Cheney Corporation*, 318 U.S. 80, this Court stated:

> " * * * The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding. Compare United States v. Chicago, M., St. P. & P. R. Co., 294 U.S. 499, 510, 511, 55 S. Ct., 462, 467, 79 L. Ed. 1023. There is no such finding here."

It is well established that it is a general rule of law that nothing can be treated as evidence that is not introduced as such. *Interstate Commerce Commission v. L. & N. R. R. Co.*, 227 U.S. 88, 91, 93; *Chicago Junction Case*, 264 U.S. 258; *United States v. Abilene & Southern Ry. Co.*, 265 U.S. 274; *Morgan v. United States*, 298 U.S. 468.

Regardless of this well-established rule of due process, the Commission here considered 11 applications, overlapping in varying degrees, conjunctively. They covered generally the area of the 11 Western States. These were heard on separate records and at different times. Some applicants had 3 witnesses; other had as high as 26 witnesses. Some records reflect testimony covering several states; other records reflect testimony covering as few as two states. These appellants were parties to some of the proceedings, but were not parties to others of the proceedings. The decision reflects an arbitrary division of the total area so that two additional carrier services were made available within, to, and from, each state.

As to evidence in proceedings in which appellants were not protestants, they obviously had no day in Court.

It is recognized that the Commission has the right, within the limits of its power, to change its policies, but if policies are changed, parties to proceedings before it should have advance notice of such change. See *Securities Exchange Commission v. Cheney Corporation*, 318 U.S. 80, 89; *E. Brooks Matlack, Inc. v. U. S.*, 119 Fed. Supp. 617.

In *Morgan v. U. S.*, 304 U.S. 1, it was held:

> " * * * But a 'full hearing'—a fair and open hearing—required more than that. The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the government proposes and to be heard upon its proposals before it issues its final command. * * *
>
> "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the 'highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

Here, the Appellants went into the instant proceedings relying upon the standards of public convenience and necessity theretofore long established by the Commission. Their evidence was directed to, and in reliance upon, such standards; yet, the Commission ignored the following elements of public convenience and necessity:

(a) The burden upon each applicant to establish a definite and continuing present or future need for the service proposed;

(b) The question of impairment or destruction of existing services and their service to the public

It is respectfully submitted that the revisal of the usual and accepted standards of public convenience and necessity without notice to these Appellants constituted denial of due process and that at least a new and further hearing to enable Appellants to adjust their cross-examination and presentment of evidence to the new standards should be provided.

CONCLUSION

For the reasons stated, we believe that each question presented by this appeal is so substantial, and is of such public importance, as to require plenary consideration, with briefs and oral argument, for the resolution of the same.

Respectfully submitted,

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August 13, 1959.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ST. JOHNS MOTOR EXPRESS CO., a corporation, Plaintiff, and JAMES J. WILLIAMS, INC., and CONSOLIDATED FREIGHTWAYS, INC., Intervening Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant, and INTERSTATE COMMERCE COMMISSION, EVERTS COMMERCIAL TRANSPORT, INC., and INLAND PETROLEUM TRANSPORTATION COMPANY, INC., Intervening Defendants.	)	Civil No. 72-59 OPINION April 27, 1959

Before MATHEWS, Circuit Judge, and MATHES and SOLOMON, District Judges.

PER CURIAM:

The principal issue involved in this case is one of fact. Plaintiff contends that there is no substantial evidence to support the Commission's findings of public convenience and necessity in granting the applications of Everts' Commercial Transport, Inc., and Inland Petroleum Transportation Company, Inc.

We have examined the Report of the Commission and conclude that the findings are amply supported.

Accordingly, the findings of fact and conclusions of law set forth in the Report of the Commission as to Docket No. MC-25643 (Sub-No. 41), entitled *Everts Commercial Transport, Inc., Extension—Bulk Commodities,* and Docket No. MC-88161 (Sub-No. 48), entitled *Inland Petroleum Transportation Co., Inc., Extension—Bulk Commodities,* are hereby confirmed and adopted as the findings of the court, and judgment thereon will be entered dismissing the action.

/s/ Clifton Mathews
Circuit Judge

/s/ Wm. C. Mathes
District Judge

/s/ Gus J. Solomon
District Judge

Endorsed:
Filed April 27, 1959
R. DeMott, Clerk
By T. Lund, Deputy

A TRUE COPY
R. DE MOTT, CLERK
By THORA LUND /s/
Deputy
(SEAL)

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and
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vs.
UNITED STATES OF AMERICA, *Appellee*,
and
INTERSTATE COMMERCE COMMISSION, EVERTS' COMMERCIAL TRANSPORT, INC., and INLAND PETROLEUM TRANSPORTATION COMPANY, INC., *Intervening Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION TO AFFIRM

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September, 1959.

THE ARGUS PRESS SEATTLE

No.

In the
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OCTOBER TERM, 1959

ST. JOHNS MOTOR EXPRESS CO., *Appellant*,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

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THE ARGUS PRESS, SEATTLE

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Intervening Appellees.

No. .....

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(e) of the Revised Rules of this Court, this intervening appellee, Inland Petroleum Transportation Company (INLAND), moves that the judgment of the district court be affirmed on the ground that the questions presented are so insubstantial as not to need further argument.

STATEMENT[1]

This is a direct appeal from the judgment of a three-

[1] To conserve the time of this Court and to avoid needless duplication, INLAND adopts by reference the Government's Motion to Affirm and its excellent detailed Statement and Argument.

judge District Court (Juris. St. 15) dismissing appellants' complaint and sustaining the Report and Order on Reconsideration by the entire membership of the Interstate Commerce Commission, hereinafter termed "Commission," in *Docket No. MC 2564* (Sub No. 36 *et al.*, *Everts' Commercial Transport Inc., Extension*, decided January 19, 1959, 78 MCC 717 (Juris. St. 1).

That Report on Reconsideration had in turn affirmed the report by a Division of the Commission, decided September 10, 1957, 72 MCC 599.

The action was brought by appellant, St. John Motor Express (ST. JOHNS), one of several competitive motor common carriers of liquid chemicals in tank trucks. Appellees, INLAND and Everts Commercial Transport (EVERTS), are two such competitors. The two intervening appellants, J. J. Williams, Inc. (WILLIAMS) and Consolidated Freightways, Inc. (CONSOLIDATED), are also two other such competitors (Juris. St. 5).

All five of these motor common carriers have for many years operated under respective certificates of convenience and necessity issued by the Commission authorizing transportation by tank truck of specified liquid commodities in various designated areas of the western states. See 78 MCC 717, *supra*, as to respectively, INLAND at 726; EVERTS at 721; ST. JOHNS at 723; WILLIAMS at 724; and CONSOLIDATED at 724-5.

In late 1955 and early 1956, intervening appellees, INLAND, EVERTS and eight other motor carriers, including intervening appellant, CONSOLIDATED, had separately applied to the Commission for certificates to ex

pand their respective rights to transport liquid chemicals in various defined territories. 78 MCC at 718-19, 771-6. These applications, including that of intervening appellant, CONSOLIDATED, were opposed by ST. JOHNS and other carriers. 78 MCC at 771-4, Appendix A. In some instances these applications were heard *seriatim* by one examiner on separate records, in others on a consolidated record by another examiner, and in still others, consecutively and separately, by other examiners. These various examiners submitted divergent recommended reports. 72 MCC at 601-5; 78 MCC at 718.

After exceptions and replies had been filed with the Commission in the several proceedings by the various supporting and opposing rail and motor carriers, a Division of the Commission disposed of all of these then pending applications to transport chemicals in the western states by one combined Report which made separate findings and conclusions as to the extent of public convenience and necessity proved by each applicant, and it authorized appropriate certificates. 72 MCC 599, 605-620.

Then various opposing carriers asked for reconsideration by the entire Commission. This was granted. 78 MCC 717, 718. After a detailed review of the record in each of these related proceedings, a majority of the entire Commission reaffirmed the Division's grant of new rights to appellees, INLAND and EVERTS. 78 MCC 720-731; it reversed an Examiner's report which had recommended denial of any further authority to CONSOLIDATED and instead granted CONSOLIDATED certain additional rights. 78 MCC at 719, 750-764; and as to other

applicants, it either reaffirmed or modified the Division's report as it found appropriate under the varying factual situations. 78 MCC 718, 731-750.

The voluminous testimony and exhibits in INLAND and in EVERTS before the Commission were introduced in evidence in the District Court and are among the papers designated by appellants on this appeal. (Appellants' Notice of Appeal, Item 10). In INLAND the transcript comprised 1,278 pages of evidence and 76 exhibits. In EVERTS they comprise 555 pages of testimony and 42 exhibits (Notice of Appeal, Item 10). The Division's Report and supporting appendices comprised 23 printed pages, 72 MCC 599; and the Commission's Report on Reconsideration, 78 MCC 717, comprises 50 printed pages including its attached appendices.

Both Reports recognize the expanding requirements of recent years in the western states for additional motor carrier services in transporting liquid chemicals because of the great increase in use of chemicals by agriculture, industry and commerce, *e.g.*, 72 MCC at 610, 615, 616; 78 MCC at 719-20, 726-31, 761-65, and *passim*.

The complaint by ST. JOHNS, and that of WILLIAMS and CONSOLIDATED, seek only to set aside the grant to INLAND and EVERTS (Juri. St. 4-5). ST. JOHNS did not attack the grant to CONSOLIDATED, or that to the several other carriers, except INLAND and EVERTS, although ST. JOHNS had opposed CONSOLIDATED and most of the other applicants in the proceedings before the Commission, 78 MCC at 771-3. Obviously CONSOLIDATED did

not complain to the District Court of the new grant to itself although it also had opposed grants to others, 72 MCC at 620-2. Hence under this strategy, ST. JOHNS will continue to enjoy its "broad authority," 78 MCC at 723, and CONSOLIDATED would continue to benefit by the new rights conferred by the Commission on it; and, if the three-judge District Court judgment were reversed, all the other newly authorized competitors would also enjoy their newly authorized rights, except appellees, INLAND and EVERTS, against whom this entire attack is leveled.

Each legal issue raised by appellants' pleadings before the District Court had been previously considered by the Commission, in the phraseology as *then* presented, see Argument, *infra*, p. 9; or was based on well-established precedents of this Court. The District Court disposed of all of these issues in two successive opinions, first, on March 10, 1959 by the Chief Judge of the District of Oregon denying ST. JOHNS' application for a temporary injunction, and later, on April 27, 1959 by the three-judge Court dismissing the action on the merits.

Appellants elected to print only the latter April opinion as their Appendix A (Juris. St. 15-16), and they omitted the District Court's "earlier opinion in the same case." Cf. USSC Rule 15(1)(h). Since that opinion had carefully considered each of the contentions now raised by Appellants' Jurisdictional Statement, as well as by their Notice of Appeal, and is not

otherwise readily available, it appears seemly for appellees to print its full text, as follows:

> "THE COURT (SOLOMON, C. J., District of Oregon): Yesterday (March 9, 1959) I announced that I was satisfied that on the showing made plaintiff was not entitled to a temporary restraining order or a temporary injunction on the basis that the Commission decided the Everts and Inland Petroleum Transportation cases on evidence introduced in eight other cases.
>
> [a] "It appeared clear from the Order of the Commission that *the Commission considered the evidence* adduced *in each case separately*. Of course, the Commission should consider general trends as shown by all of the cases, but certainly the Commission cannot blind itself to what is happening in the chemical field.
>
> [b] "I *also* stated that in my view *there was no merit in the contention that the order was based on mere possibilities*. The order contained a recital of evidence indicating the actual construction of some plants and the assurances given that other plants were to be constructed in the near future. I think that *the Commission would have been derelict in its duty to wait until the plants had actually been constructed* in order to grant licenses. This is *particularly* true *in view of the fact* that *the hearing* in this case *took place in 1956*, and *here it is 1959 and the certificates have not yet been issued*.
>
> [c] "*I do not agree with the* plaintiff's *interpretation of the statements* made in the order *that the service*

[2] Bracketed letters supplied therein to correspond to separate contentions of appellants in the court below. Emphasis supplied herein unless otherwise shown.

was adequate. Plaintiff has taken one or two statements out of context in order to support such statement, *but these* statements *are in direct conflict with* the holding of the Commission and with *the evidence upon which the holding was made.*

[d] "It is obvious *from an examination of the evidence* reviewed by the Commission that *the service rendered by St. Johns will be actually inadequate* with the construction of the new plants *and* that the situation *will not be relieved by other types of transportation presently available.*

"In considering the advantages and disadvantages which would result from the granting or withholding of temporary injunctive relief, I have come to the conclusion that the losses to be suffered by the intervening defendants if an injunction were granted would greatly exceed the disadvantages to be suffered by the plaintiff in the event that the certificates were issued by the Interstate Commerce Commission.

[e] "Yesterday I reserved the point made by the plaintiff that the Commission did not consider the National Transportation Policy. I was in doubt as to whether the statement in the order that the Commission constantly kept in mind its responsibilities under the National Transportation Policy was adequate or that its statement that a specific finding was neither necessary nor appropriate was correct. While I am not in full agreement with the statement in the order; and even though I think it would have been much better practice for the Commission to have made specific findings, *a reading of the Commission's order affirmatively shows that the Commission did in fact consider the National Transportation Policy.*

> "Under the authority of *Luckenbach v. United States*, 122 F.Supp. 824, which was *affirmed, per curiam* by the Supreme Court of the United States in 347 U.S. 984, *I believe that to be sufficient.*
>
> "I therefore find that the plaintiff has failed to make an adequate showing on any ground for the issuance of a temporary restraining order or an injunction, and its application for such order is therefore denied."[3]

Subsequently, separate and extensive briefs were submitted to the District Court on behalf of appellants, ST. JOHNS and of WILLIAMS CONSOLIDATED, and by appellees, United States ICC, and by INLAND and by EVERTS. The matter was then fully heard on the merits before the three-judge District Court (Juris. St. 2-15-16).

After trial on the merits, the three-judge Court confirmed and adopted as the finding of that Court all of the Commission's findings of fact and conclusions of law, and thereupon dismissed the action (Juris. St., Appendix A, p. 16).

[3] Quoted in full text from Clerk's Certificate to this Court pursuant to Designation of Record in Appellants' Notice of Appeal, Item 6.

[4] Appellants' Notice of Appeal (Items 5, 8 and 9) designated that the transcripts of all oral arguments in the court below be transmitted to this Court. Appellees are advised the Clerk of the District Court has complied. Accordingly, since these transcripts are now before this Court, and since the three-judge court considered, on oral arguments, each contention now raised on appeal, the Argument section of this Motion to Affirm will cite appropriate transcript references thereto.

ARGUMENT

I.

A. Since ST. JOHNS' first contention as to the scope of the National Transportation Policy is the prime issue raised on this appeal, this brief is addressed chiefly to it. ST. JOHNS' contention is essentially one of semantics made manifest by its shifting statements of this contention before the Commission, the District Court, and this Court. It now asks this Court:

> "1. Must the Interstate Commerce Commission consider, give weight to, *make findings* and discuss the National Transportation Policy, *in public convenience and necessity proceedings*, with respect to *whether* the proposed *additional operating authorities*, upon the evidence of record in each proceeding, *would impair* the ability to (*sic*) existing carriers to maintain *a safe, adequate, economical and efficient service?*" (Juris. St. 3)

B. It had made a significantly differently phrased contention before the Commission in its Petition for Reconsideration. Cf. *United States v. Tucker Truck Line*, 344 U.S. 33, 36-7 (1952). The Commission's final decision, 78 MCC 717 at 764-5, reported:

> "One other matter warrants discussion here. *St. Johns asserts that it is error to grant common-carrier authority without a specific finding that the grant is consistent with the public interest and the national transportation policy.* Such a finding is appropriate only in granting motor contract carrier authority. If a proceeding involving a motor-carrier application for authority to provide service between points served exclusively by rail, the standards of the national transportation policy

must be correctly applied (*Schaffer Transp. Co. v. United States*, 355 U.S. 83), but in no proceeding involving common-carrier authority by motor vehicle is there a specific finding such as suggested by St. Johns necessary or appropriate. We have, of course, constantly kept in mind our responsibilities under the national transportation policy. It goes without saying that the purpose of the policy must be considered in all proceedings of the character here presented."

(1) Clearly the answer to appellants' "question presented," as now phrased (Juris. St. 3) is that the Commission did (1) "*consider*" and (2) "*give weight to*" and (3) "*discuss*" the National Transportation Policy. 78 MCC at 764-5. The Commission did not (4) make the requested "*finding*" (Juris. St. 3). Instead, it carefully explained that in granting *common* carrier authority (*i.e.* in "public convenience and necessity proceedings") the statute does not provide for:

> "a specific *finding* that the grant is consistent with the public interest and the National Transportation Policy." 78 MCC at 764.

The Commission pointed out that such a specific *finding* is only applicable to *contract* carriers. Cf. 49 USCA §307(a) and §309(b). 78 MCC at 764.

(2) Nor had St. Johns' complaint before the District Court gone so far. It then only alleged the Commission had erred in failing:

> "to *consider or* make *any* findings with respect to the National Transportation Policy"

and that the Commission had erred in holding that:

> "findings with respect to the National Transpo

tation Policy were only necessary in cases involving CONTRACT CARRIER APPLICATIONS."[15]

(3) Similarly, intervening appellants, Williams and Consolidated, alleged in the District Court only that:

"* * * the Commission exceeded its statutory powers relating to the issuance of certificates of public convenience and necessity as set forth in the National Transportation Policy and Section 307, Title 49, U.S.C.A."[16]

(4) As heretofore noted, the District Court, on application for temporary restraining order, held:

"* * * a reading of the Commission's order affirmatively shows that the Commission did in fact *consider* the National Transportation Policy.

"Under the authority of *Luckenbach v. United States*, 122 Federal Supp. 824, which was affirmed *per curiam* by the Supreme Court of the United States in 347 U.S. 984, *I believe that to be sufficient.* * * *"

(5) St. Johns' complaint before the District Court, in alleging a violation of the National Transportation Policy, had cited two District Court cases,[3] *Pacific Inland Tariff Bureau v. U. S.* (D.C. Ore. 1955) 129 F. Supp. 172, and *Cantlay & Tazzola v. U.S.* (D.C. Calif. 1953) 115 F.Supp. 72. These two cited opinions had been written, respectively, by two of the three members of the instant three-judge court: Hon. Gus J. Solomon,

[15] Emphasis in St. Johns' Bill for an Injunction. (Appellants' Notice of Appeal, Item 1, p. 5 (sic) 62, lines 23 to 24.)

[16] Cross Designation by Defendants of Additional Portions of Record to be Certified on Appeal, Item 5, p. 1, lines 26 to 30.

[3] See Notice of Appeal, Item 1, Petition and Bill for Injunction, p. 5 (sic, 62) lines 26-30.

Chief Judge, of Oregon, and Hon. William C. Mathes, District Judge, of California. Hence the constituted Court had previously become thoroughly familiar with these cases and with the broad issue, and it was again elaborately briefed and argued." The two cited cases relate to "rate wars" and not to certificates of public convenience and necessity. The *Cantlay & Tanzola* case had been distinguished by Judge Hand in the *Luckenbach* certificate of convenience and necessity case cited in the trial court's opinion, *supra*, 122 F.Supp. 824, aff'd *per curiam*, 347 U.S. 984. The members of the three-judge court, on oral argument recognized these legal differences[9] and in their final opinion they rejected ST. JOHNS' contention and adopted the Commission's report, stating:

> "Accordingly the findings of fact and conclusions of law set forth in the report of the Commission (78 MCC 717) * * * are hereby confirmed and adopted as the findings of the court, * * * ". (Juris. St. p. 16)

C. In the Court below, as here, the Government's Argument supporting its Motion to Affirm makes a scholarly analysis of all reported cases on the relation of the National Transportation Policy to the Commission's administration of its many duties. INLAND adopts by reference that analysis, and confines its argument to the *statutory* evolution, which it submits is in harmony with the *decisional* evolution.

[8] Appellants' Notice of Appeal, Item 9, Transcript Apr. 27, 1959, p. 6 *ff passim*.

[9] App. Notice of Appeal, Item 9, Transcript Apr. 27, 1959, *e.g.*, pp. 7, 15-16, 17-19, 20, 50-56.

(1) Inland believes that in determining the scope of the National Transportation Policy, it is helpful to review the historical evolution of the applicable statutes.

(2) The term "public convenience and necessity" is nowhere defined in federal legislation, yet it has been the sole yardstick for the Commission for more than thirty years.[9] It has had extensive administrative and judicial construction. In *I.C.C. v. Parker*, 326 U.S. 60, 65 (1945) this Court held:

> "Public convenience and necessity is not defined by the statute. The nouns in the phrase possess connotations which have evolved from the *half-century experience* of government in the regulation of transportation. When *Congress* in 1935 amended the Interstate Commerce Act by *adding the Motor Carrier Act*, it *chose the same words* to state the condition for new motor lines which had been employed for similar purposes for railroads in the same Act since * * * 1920 * * *. *Such use indicated a continuation in the administrative and judicial interpretation of the language.*"

The statutory prerequisite of a finding of "present or future public convenience and necessity" is still the *sole* finding required by Congress for issuance of *certificates of public convenience and necessity* authorizing operations of *common* carriers, whether by railroad, 49 USCA §1 (18-20); or by motor, 49 USCA §307; or by water, 49 USCA §909(d).

[9] 49 USCA §1(18)ff (1920), applying to railroads. Year in and year out the Commission uses this same standard to determine thousands of motor common carrier applications for certificate of convenience and necessity, *cf.*, Volumes 1 to 73, Motor Carrier Cases and 72d An. Rep. ICC (1958) p. 43.

(3) Originally most regulated transportation was by *railroad* and virtually all railroads were *common* carriers; hence there was no legislative occasion to distinguish the statutory criteria applicable to common vs. contract carriers.

(4) This statutory standard is in sharp contrast to that applicable to *permits* authorizing operation by *contract* carriers.

(5) When Congress determined to regulate motor carriers in the 1930's the successive House and Senate bills recognized the then very current legal distinctions that had been drawn between power to regulate *common* carriers and that to regulate *contract* carriers. Cf. *Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583 (1926); *Smith v. Cahoon*, 283 U.S. 553 (1931) and *Stephenson v. Binford*, 287 U.S. 251 (1932); *Coordination of Motor Transportation*, 182 ICC 263, 381-2, and cases cited at note 77 (1932).

(6) Accordingly when Congress enacted the Motor Carrier Act, 1935, it made a clear-cut distinction between the legislative requirements for grants of *certificates* to *common* carriers and *permits* to *contract* carriers. 49 USCA §§307 and 309. It required for both types proof that the applicant be "fit, willing and able", but the yardstick of proof for granting a *certificate* to a *common* carrier continued to be solely the historical and judicially construed, requirement of "public convenience and necessity." The new yardstick created for granting a permit to a contract carrier was proof and a "finding" that it is:

[a] "Consistent with the public interest, and [b] "the National Transportation Policy." (49 USCA §309(b)).

These identical legislative distinctions between the standards of proof and required findings for common carrier certificates and for contract carrier permits are similarly preserved in the regulation of water carriers. Cf. 49 USCA §909(c) and (g).

(7) Congress, in carefully drafting the Transportation Act of 1940, prefaced it with a declaration of the National Transportation Policy and listed many factors to be *considered* by the Commission in performing its various complex duties. In its closing sentence, it provides broadly that:

"'*All* of the *provisions* of this Act *shall be administered* and enforced with a view to carrying out the above declaration of policy.'" 49 USCA, note preceding §1.

The new yardstick as originally enacted for *contract carriers* was proof that it was [a] "consistent with the public interest and [b] *the declaration of policy of the* 'Motor Carrier' *Act* of 1935". Public Law No. 255, 74th Cong. Sec. 202(a); 49 Stat. 543.

When the National Transportation Policy was formulated in the 1940 Act, the new Act was changed at every place where there had been reference to the "declaration of policy" of Part II of the said Motor Carrier Act, 1935; and, instead, the 1940 Act substituted the words "*National Transportation Policy*." Public Law No. 785, 76th Cong. Sec. 16; 54 Stat. 913, (1940).

McLean Trucking Co. v. U. S., 321 U.S. 67, at 82, traced the evolution of the Motor Carrier Act and said:

"In 1935 it enacted a comprehensive scheme of regulation for motor carriers. * * * The policy which was to guide the Commission in administering that Act was fully stated" [fn. 16 quotes its text which includes many of the identical words used in the national transportation policy including to 'promote adequate economical and efficient service by motor carriers'] and has since been absorbed into the equally full statement of the national transportation policy."

(8) The 1940 Act then carefully designated certain specific tasks in addition to contract carrier permits in which it specifically required the Commission to make "*findings*" as to conformity with the National Transportation Policy. For example, [a] Agreements that would otherwise violate anti-trust laws, 49 USCA §5a(2); [b] exemptions of water carriers engaged in harbor operations, 49 USCA §903(g); [c] exemption of motor carrier providing interstate services to and from airports, 49 USCA §303(b)(7a); [d] dual operations as a common and contract carrier by motor, 49 USCA §310; or by water, 49 USCA §910; [e] operation as a broker of motor carrier service, 49 USCA §211(b); [f] relief from requirements that *contract* carriers publish and file minimum reasonable rates, 49 USCA §318(a); and [g] compare other parallel provisions in the Water Carrier title, Part III, and in the Freight Forwarder Title, Part IV, of the Act, 49 USCA §901, ff., 49 USCA §1001 ff.

(9) Against this background we re-read the applicable portions of the Commission's Report, which states that:

> "St. Johns asserts that it is error to grant *common* carrier authority without a *specific* finding that the grant is consistent with the public interest and the National Transportation Policy." (78 MCC at 764)

Instead the Commission held that:

> "Such a *finding* is appropriate only in granting a motor *contract* carrier authority." (78 MCC at 764)

(10) It is respectfully submitted that this is an accu-

rate statement of the law. The "*finding*" which ST. JOHNS urges is *not* required or authorized by law for *certificates* for *common* carriers. In granting certificates of public convenience and necessity for common carriers, all that the law and court decisions require is that the Commission find "public convenience and necessity"; and that its report be sufficiently clear so that this Court may verify that Commission action "*comports*" with the National Transportation Policy. *Schaffer Transp. Co. v. United States*, 355 U.S. 83, 92 (1957), *infra*.

(11) In view of this clear and careful legislative distinction, ST. JOHNS is patently in error in demanding that the Commission make a finding of conformance with the National Transportation Policy in issuing a common carrier certificate under §307.

C. Continuing, the Commission's report, 78 MCC 761-5, analyzes this Court's decision in *Schaffer Transp. Co., supra*.

(1) An order of the Commission had *denied* a certificate to a motor common carrier to transport granite funeral blocks solely on the basis of opposition by competing railroads. There were no existing motor carriers to transport this granite. This Court held the Commission, in denying any motor carrier certificate, had failed to *consider* the "comparative advantages" to the public of motor carrier service as well as of rail carrier service, and therefore was unlawful because the Commission's Report and Order did not;

"* * * provide this Court with a basis for deter-

mining whether the Commission's decision *comports* with the National Transportation Policy * * *." 355 U.S. at 92.

An appropriate definition of the verb "to comport" is:

"2. To agree; accord, or suit (with):" Webster's New International Dictionary (2nd Ed. 1946).

(2) There is no such problem in the instant proceedings. No rail carrier has challenged the Commission's order; the record and both reports of the Commission abound with references to the "comparative advantages" of rail and motor carriers in serving consumers and manufacturers of liquid chemicals; *e.g.* 72 MCC 599, 615; 78 MCC 717, 722, 729, 761. Therefore the Commission held at 78 MCC 764-5:

"* * *In a proceeding involving a motor-carrier application for authority to provide service between points served exclusively by rail, the standards of the national transportation policy must be correctly applied (*Schaffer Transp. Co. v. United States*, 355 U.S. 83), but in no proceeding involving common-carrier authority by motor vehicle is there a specific finding such as suggested by St. Johns necessary or appropriate."

D. Finally, the Commission held that:

"It goes without saying that the *purposes* of (the National Transportation Policy) must be *considered* in all proceedings of the character here presented." 78 MCC at 765.

and the Commission reported that:

"We have, of course, constantly kept in mind

our responsibilities under the National Transportation Policy." 78 MCC at 765.

(1) This is precisely what the Act contemplates. Thus, it is very clear, from the Commission's careful appraisal of the advantages and disadvantages of rail services, and of existing motor carrier services, and of shipper requirements for additional motor carrier facilities in varying segments of the West, that the Commission's Report fulfilled all requirements of law and clearly provides this Court with the required basis for determining that the Commission's decision does "comport" with the National Transportation Policy; and therefore it is respectfully submitted that the Commission's report fully complies with this Court's decision in *Schaffer Transp. Co. v. U.S.*, *supra*, 355 U.S. 83, 92 (1957). Cf, *Luckenbach SS Co. v. U.S.*, 122 F.Supp. 824; aff'd 347 U.S. 984 (1954); *ICC v. Balt. O. R. Co.*, 355 U.S. 175, 178 (1957).

(2) It follows that neither the language of the 1940 Declaration of Policy, nor the *Schaffer* case in construing this policy in any way supports St. Johns' contentions in this case.

II.

A. Appellants next contend that the Commission predicated its Findings and Conclusions upon evidence not of record in the subject proceeding. From this false premise appellants leap to the conclusion of violation of due process.

(1) The premise is false because every single phrase, clause and sentence of the Commission's decision grant-

ing certificates to INLAND and to EVERTS is carefully supported by transcript reference to the 18 shipper witnesses who supported INLAND as well as to those who supported EVERTS.

This was copiously referred to in the oral argument before the trial court, the transcript of which the appellants have designated to be certified on appeal (Notice of Appeal, Item 10, Record of Proceedings and Exhibits before ICC in INLAND and EVERTS, Item 9, Transcripts of Oral Arguments before District Court, April 27, 1959, pp. 30-31, 36-37, 48, 66, 72, 74-75.)

(2) The conclusion is also false because, as the Government's Motion to Affirm quotes, there are no less than four passages in the Commission's final report showing that it considered the evidence of record as to each application separately (78 MCC 717 at 720, 761, 762).

(3) As the Commission emphasized, its Final Report discussed—

> "* * * the evidence presented in each proceeding by the applicant and opposing carriers either separately or together in properly related cases, and follow such discussion by evidentiary findings with respect to the need shown for additional motor carrier service in the light of the shipper testimony and the existing transportation facilities." (78 MCC at 720)

Thus, it is crystal clear that the Commission scrupulously sought to consider each of the ten companion applications on its respective merits.

B. Even assuming, *arguendo*, that the Commission

"in the final stage of forming its judgment"

took broad cognizance of the tremendous increases in production and distribution of chemicals in the West as portrayed in each of the various companion cases, this is not error. In *U.S. v. Pierce Auto Lines*, 327 U.S. 515, 529 (1945) this Court said:

> "In the absence of any showing of specific prejudice, the claim comes down to the highly technical objection that the Commission, *in the final stage of forming its judgment*, could not in either case take count of what had been done in the other, notwithstanding the closely related character and objects of the applications and the prior proceedings. * * * Obviously *it would be consistent neither with good sense nor*, we think, with the type of hearing assured by the *statute* to force the Commission *to put on such complete blinders* * * *. And, given that the report contains all the essential findings required, (citing case) the Commission is not compelled to annotate to each finding the evidence supporting it."

III.

A. Next appellants claim in effect that the Commission had "changed the rules of the game" during the half. This charge appears baseless. In oral argument it was pointed out, that the very counsel for intervening appellant, CONSOLIDATED, who urged this contention, had himself also appeared in these very proceedings on behalf of still another applicant, Pacific Inter-Mountain Express (ICC Docket No. MC 730 Sub 60). See 72 MCC at 599, 611 ff; 78 MCC 717 at 743 ff. In such ca-

pacity he cited many 10C reports enunciating the very rules for multiple grants that appellants now allege to be new rules. (See Notice of Appeal, Item 9, Transcript of April 27, 1959, pp. 67-68, 69, 70-71, 88).

B. The Commission, like the Courts, recognize that each case must be judged on its own merits. There is no guarantee of a continuous monopoly based solely on broad claims of lack of full use of existing carriers and regardless of shipper needs for improved service. That is what appellant urges was the old rule of the game. No such rule exists.

IV.

The last question raised by appellant seems almost rhetorical. It is obvious that the Commission cannot make Findings or Conclusions not supported by substantial evidence. The record is before the Court. Aid in reading the report was abundantly furnished by the government's annotations to transcript references in the Court below,[12] implementing each and every finding with transcript references to the record. This contention, like the others, is utterly without merit.

[12] *Supra*, pp. 19-20.

CONCLUSION

It is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument (USSC Rule 16(1)(c)); and therefore the judgment of the District Court should be affirmed.

Respectfully submitted,

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Dated at Seattle, Washington, this
14th day of September, 1959.

CERTIFICATE OF SERVICE

I, Albert E. Stephan, Attorney for Inland Petroleum Transportation Company, Inc., one of the appellees herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 14th day of September, 1959 I served copies of foregoing Motion to Affirm on the several parties to this appeal, as follows:

1. On the appellants, by mailing copies in duly addressed envelopes, with first-class airmail postage prepaid, to Bryce Rea, Jr., Esq., Munsey Building, Washington 4, D.C., and by first-class regular mail, postage prepaid, to John M. Hickson, Esqs, Failing Building, Portland, Oregon, and William B. Adams, Esq., 331 Pacific Building, Portland, Oregon.

2. On the United States of America, appellee, by mailing copies, in duly addressed envelopes with first-class airmail postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D.C., and John H. D. Wigger, Esq., Anti-Trust Division, Department of Justice, Washington 25, D.C., and by first-class regular mail, postage prepaid, to Clarence E. Luckey, Esq., United States Attorney, U.S. Court House, Portland, Oregon.

3. On the Interstate Commerce Commission, appellee, by mailing copies in duly addressed envelopes, with first-class airmail postage prepaid to Robert W. Ginnane, Esq., General Counsel, and to James Y. Piper, Esq., Assistant General Counsel, Interstate Commerce Commission, Washington 25, D.C.

4. On Everts' Commercial Transport, Inc., appellee, by mailing a copy in duly addressed envelope, with first-class regular mail postage prepaid, to Earle V. White, Esq., 2130 S.W. 5th Avenue, Portland, Oregon.

ALBERT E. STEPHAN

711 Central Building
Seattle 4, Washington

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JAMES R. BROWNING, Clerk

In the Supreme Court

of the United States

October Term, 1959

No. 337

ST. JOHNS MOTOR EXPRESS CO.,
JAMES J. WILLIAMS, INC., and
CONSOLIDATED FREIGHTWAYS, INC.,

Appellants,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
EVERTS' COMMERCIAL TRANSPORT, INC., and
INLAND PETROLEUM TRANSPORTATION
COMPANY, INC.,

Appellees.

MOTION TO AFFIRM

On Appeal from the United States District Court for the District of Oregon

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ST. JOHNS MOTOR EXPRESS CO.,
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COMPANY, INC.,
Appellees.

MOTION TO AFFIRM

On Appeal from the United States District Court for the District of Oregon

Appellee Everts' Commercial Transport, Inc., pursuant to Rule 16, paragraph 1 (c) of the Revised Rules of this Court, moves that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from the judgment of a three-judge district court (Juris. St. pp. 15-16) dismiss-

ing the appellants' complaint and sustaining the report and order of the Interstate Commerce Commission in its Dockets MC-25643 (Subs 36 and 41) entitled Everts' Commercial Transport, Inc., Extension—Bulk Commodities, and MC-88161 (Sub 48) entitled Inland Petroleum Transportation Company, Inc., Extension—Bulk Commodities; now reported together with seven other Commission dockets under the title *Everts' Commercial Transport, Inc., Extension—Richmond* at 78 M.C.C. 717.

EVERTS' is a motor common carrier that has specialized in the tank truck transportation of bulk acids and chemicals since 1947. Its initial authority, plus some thirty-odd extensions granted by the Interstate Commerce Commission, authorized the transportation of what might be termed specific rather than generic commodities, and between points, counties, or areas of states rather than between wider territorities that would embrace one or several states as a whole. With what it contends was and still is a rapid expansion of the chemical industry on the Pacific Coast, attendant with a broadened spectrum of acid and chemical commodities being, and to be, produced at plants throughout the Pacific Coast area and to be marketed to a diverse and expanding market throughout the same area, EVERTS filed its application in Commission Docket MC-25643, Sub 41.

EVERTS' Sub 41 application was for an extension of its then existing certificate authorities. This application also embraced authorities sought in pending applications: Sub 32 for Methanol from California counties to points in Oregon and Washington; and Sub 36 for

Phenol from Contra Costa County, California, to points in Oregon and Washington. EVERTS' Sub 41 sought broad commodity authority in asking for generic commodities, i.e., "acids, coal-tar products, chemicals and chemical solutions, and petro-chemicals," to provide it with sufficient commodity authority to keep pace with the new developments within the chemical industry. It requested authority within the area of a natural group of states in which it already had extensive operations, but for a sufficiently broad area-wide grant as to provide it with a natural territorial coverage for its chemical customers.

EVERTS' Sub 41 hearing was held at Portland commencing May 3, 1956. It had the support of large chemical concerns located on the Pacific Coast, and the support also of INLAND and of Pacific Truck Service, the latter a motor common carrier of acids and chemicals domiciled in California. It was opposed by various rail and motor carriers, all of whom were fully heard, and many of whom, as their interests indicated to them, participated in the balance of the case through its reconsideration by the entire Commission.*

Subsequent to the hearing the Commission's Examiner recommended denial and EVERTS filed exceptions. The Commission's Division 1 thereafter decided in favor of a large part of the application and issued its report to that effect under date of September 10, 1957. The report of Division 1 is attached to EVERTS'

*The transcript of testimony in Everts' Sub 41 before the Commission covers 555 pages, and 42 exhibits were offered, all but one of which were received.

Answer as Appendix A (Notice of Appeal Item 3), and is reported in 72 M.C.C. 599.

Thereafter, some of the opposition, including the appellants herein, petitioned for reconsideration by the whole Commission and the same was granted. The Commission thereafter made its decision of January 19, 1959, in which it granted to EVERTS motor common carrier authority to transport acids and chemicals in bulk between points in California, Oregon, and Washington. It is the latter Order (78 M.C.C. 717), as it applies to EVERTS and INLAND, which was unanimously sustained by the three-judge District Court in the judgment of April 27, 1959.

The Commission's lengthy decision of sixty pages (including appendices) contains numerous findings of fact from the evidence adduced in the EVERTS and INLAND hearings, and contains also the necessary ultimate findings required by section 207 (a) of the Interstate Commerce Act. The ultimate findings that must be made by the Commission are:

(1) " * * * that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and

(2) "that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity;

"otherwise such application shall be denied." (49 U.S.C. Sec. 307 (a))

That the Commission did, with consummate care,

match the very substantial evidence contained within the records with the various criteria used in reaching a careful decision on each of these ultimate findings, is commended to this Court by the unanimous opinion of the three-judge District Court in sustaining the Commission completely.

Appellants allege that the District Court ignored three of their questions. However, the transcript of oral arguments heard below, including oral opinions expressed by the Court in course of the proceedings, show clearly that the questions referred to (Juris. St. p. 5) were fully and carefully considered by the Court, that in doing so the Court examined the Commission's order in detail, and that it was well satisfied with the Commission's compliance with all legal measurements required of it by statute, case law, and Commission practice and precedent (Notice of Appeal Items 5, 8, 9).

ARGUMENT

I.

There is nothing novel in the first question presented by appellants (Juris. St. pp. 3, 6-10). The question posed assumes conditions that do not prevail herein. Appellants assume that the Commission did not appraise all relevant issues before it in the light of the national transportation policy, whereas, the Commission said:

> "We have, of course, constantly kept in mind our responsibilities under the national transportation policy. It goes without saying that the purpose

of the policy must be considered in all proceedings of the character here presented." (765)[1]

Appellants' argument is posed on the hypothesis that the Commission did not consider the scope and adequacy of any existing services and the effect the instant grants of authority would have upon any such services as may be found to exist; whereas, the Commission carefully considered any and all services that allegedly existed, found them to be grossly inadequate, and found a need for the improved services proposed by the applicants. The question thus assumes that unless the Commission, in determining the ultimate issues of fitness and convenience and necessity, does not also allude in specific terms to the national transportation policy as it goes along, it has been derelict in its duties.

Brief references to the Act would seem to readily negate the appellants' position, for such an interpretation of the statute would not only strain the expressed instructions of the Congress but would seem to nullify them. For Section 207 (a) of the Act (49 U.S.C. § 307 (a)) provides that a common carrier certificate shall be issued if it is found:

(1) *"that the applicant is fit, willing, and able* properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission" and

(a) *"that the proposed service * * * is or will be required by the present or future public convenience and necessity."* (Emphasis supplied)

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[1]Page references are to the Commission's report in 78 M.C.C. 717.

Those are the two ultimate issues that must be determined by the Commission, specifically, in deciding a motor common carrier certificate application.

The term "national transportation policy" appears in only two places in the Motor Carrier Act (Part II of the Interstate Commerce Act). Its first appearance is in section 209 (b) (49 U.S.C. § 309 (b)) with respect to the issue of CONTRACT CARRIER PERMITS, which section is a counterpart to the Certificate Section 207, and relative to Contract Carrier Permits it requires the two ultimates of: (1) fitness; and (2) "that the proposed (contract carrier) operation will be consistent with the public interest and the national transportation policy declared in this Act."

The other appearance of the term, also relative to CONTRACT CARRIER PERMIT matters, is in Section 210 (49 U.S.C. § 310) and requires the Commission to first find any proposed dual operations by one carrier, of both Contract and Common carrier services, to be consistent with the public interest and national transportation policy before such dual status may be permitted.

The National Transportation Policy (49 U.S.C.) precedes the first section of the Interstate Commerce Act, thus serving as a *general policy statement* relative to all transportation matters embraced within the Interstate Commerce Act. The last sentence of the pronouncement reads:

> "All of the provisions of this Act shall be administered and enforced with a view to carrying

out the above *declaration of policy.*" (Emphasis supplied)

The Congress does not appear to have said, then: "Those criteria set forth in section 207 (a) governing the issue of motor common carrier certificates are set at nought and nullified hereby, and the Commission will hereafter determine certificate matters in accordance with the above declaration and without regard to those specific criteria provided in said section." To consider and administer the Act as a whole the Congress seems to have said to the Commission that its regulation of the entire transportation industry of the nation must be in accord with the broad policy set forth in its declared national transportation policy, and when it is faced with a specific problem involving the issue of a motor common carrier certificate it will thereupon base its determinations on two ultimate specifications: fitness; and the present or future public convenience and necessity.

This statement of policy does not confer any authority not specifically conferred by the substantive provisions of the Act, nor would it take it away. Rather, it is a clear statement of the intention of Congress to aid and direct the Commission in its sound interpretation of the provisions of the Act. Hence it is a guide to the Commission, not a formula. The various formulae are set forth in the different parts and sections of the Act itself. The formula with respect to the issue of a motor common carrier operating certificate (not a contract carrier permit) is dual—fitness and public convenience and necessity.

In its disposition of the ultimate issue—public convenience and necessity—the Commission often is faced with sub-issues, such as adequacy and inadequacy of the existing service, interests of competing carriers, improvements in service to the public, advantages and disadvantages to the public, and many others. But none of these are specified in the Act—they are simply inherent in many situations involving convenience and necessity. Admittedly, everything the Commission does must comply with the national transportation policy: *Ann Arbor R. Co. v. United States,* 281 U.S. 658.

In any research on this question one will find many, many cases that have been before the courts and involved the matter of findings relative to the national transportation policy. But with a few exceptions they are all RATE CASES.

This Court is not interested in empty references being made to a statement of policy by the agency. It would seem keenly interested, instead, with whether the essential basis of the Commission's decision is disclosed by its findings and conclusions, and whether it is apparent from the decision that the Commission has appraised the issues in the light of the national transportation policy by which it is always constrained.

This Court has held that if the essential basis of the Commission's judgment is sufficiently disclosed in its report and if the report, when read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting evidence, then it must stand. *Alabama Great Southern R. R. v. United States,* 340 U.S. 216;

Newtex Steamship Corp. v. United States, 107 F. Supp. 388, affirmed per curiam 344 U.S. 901.

The *Alabama Great Southern Case*, supra, involved the prescription by the Commission of a lower rate for a joint rail-barge haul than for an all-rail haul between the same points, and the Court held the Commission was not bound to consider the relative cost of service, observing that the inherent advantage of rail transportation, superior service, was reflected in the higher rate and that competition from inferior barge service could not be remedied by a demand for increase in the rates for the inferior service. Although this was a rate case, the Court dealt rather completely with the "essential findings required of the Commission." The Court observed as follows:

> " * * *. The statute requires the Commission only to file a written report, stating its conclusions, together with its decision and order. This the Commission did, and *the essential basis of its judgment is sufficently disclosed in its report*. Of course Sec. 14 (1) does not relieve the Commission of the duty to make the 'basic' or 'quasi-jurisdictional' findings essential to the statutory validity of an order. *Florida v. United States*, 282 U.S. 194, 215; *United States v. Baltimore & O. R. Co.*, 293 U.S. 454, 464-465. And the basic findings essential to the validity of a given order will vary to the statutory authority invoked and the context of the situation presented. E.g., *United States v. Pierce Auto Lines*, 327 U.S. 515; *North Carolina v. United States*, 325 U.S. 507; *Yonkers v. United States*, 320 U.S. 685; *United States v. Carolina Carriers Corp.*, 315 U.S. 475. * * * And *'the report, read as a whole, sufficently expresses the conclusion of the Commission*, based upon supporting data . . . .' *United States v. Louisiana*, 290 U.S. 70, 80. Enough has been

'put on record to enable us to perform the limited task which is ours.' *Eastern-Central Assn. v. United States*, 321 U.S. 194, 212." (Emphasis supplied)

The *Newtex Steamship Case*, supra, is extremely compelling on this general point. It involved an injunction suit to set aside an I.C.C. order that authorized the Pan-Atlantic Steamship Co. to extend its inland water operations to perform the transportation of freight and passengers between specified Atlantic and Gulf ports and the ports of Houston and Galveston. The Court concluded that the scope of its review was limited to the question of whether the order and report of the Commission encompassed *the ultimate findings required by the statute*, founded upon adequate basic or evidentiary findings which are in turn supported by substantial evidence in the report. The gravamen of the complaint was that the report was fatally defective because basic findings were made and established by the evidence which did not support the ultimate conclusion. The Court held in effect that while the Commission is not required to make formal or detailed findings of fact, it did not mean that findings may be undiscernible, vague or non-existent and abdicated their function to some generalized impression said to be conveyed by the whole report. However, the Court held that statements extracted out of context would not prove fatal to the report when, *reading the report as a whole the essential findings clearly appear*. The Court's own words are more compelling than ours and in part are as follows:

"The *ultimate findings* required by law are that (1) 'The applicant is fit, willing and able properly to perform the service proposed,' and (2) 'The pro-

posed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity.' These findings were explicitly made in terms of the statutory language, and an examination of the report discloses that they are rationally supported by adequate basic findings which are supported by substantial evidence:

" * * * *The question is whether 'the essential basis of (the Commission's) judgment is sufficiently disclosed in its report' and whether '"the report read as a whole sufficiently expresses the conclusion of the Commission, based upon supporting data* * * * ."' *Alabama Great Southern R. Co. v. United States,* 240 U.S. 216, 228. Reading the report as a whole, we think that the essential findings clearly appear. (Emphasis supplied)

Thus this Court's concern has been not with the dogmatics of verbal references, but with the agency's own summary of the evidence, its findings, and that the Commission has appraised the issues in the broad light of the national transportation policy.

Appellants' citations are quite helpful to the position herein expressed. Reference has been made to *Schaffer Transportation Co. v. United States,* 355 U.S. 83 (Juris. St. pp. 7-8). This case involved a motor carrier application where no motor carrier service existed, only rail service; this Court holding that the Commission had not adequately applied the standards of the national transportation policy in denying the motor carrier's application. Therein this Court held that it was apparent that there had been no evaluation made of the "inherent advantages" that might be provided by this initial carrier's services—that where only rail transportation is

presently available the inherent advantages of a proposed motor service becomes a critical factor which the Commission must assess. Without such an assessment one mode of transport would have been provided with unwarranted protection from the competition of others. In the instant case no such issue exists at all.

In the *Schaffer Case* this Court said:

"The National Transportation Policy, formulated by Congress, specifies in its terms that it is to govern the Commission in the administration and enforcement of all provisions of the Act, and this Court has made it clear that *this policy is the yardstick by* which the correctness of the Commission's actions will be measured. *Dixie Carriers, Inc. v. United States,* 351 U.S. 56; *Eastern-Central Motor Carriers Ass'n v. United States,* 321 U.S. 194; *McLean Trucking Co. v. United States,* 321 U.S. 67. Of course, the Commission possesses a 'wide range of discretionary authority' in determining whether the public interest warrants certification of any particular proposed service. *United States v. Detroit & Cleveland Navigation Co.,* 326 U.S. 236, 241; *Interstate Commerce Commission v. Parker,* 326 U.S. 60. But that discretion must be exercised in conformity with the declared policies of the Congress. To see whether those policies have been implemented *we look to the Commission's own summary of the evidence, and particularly to the findings, formal or otherwise, which the Commission has made.* Just as we would overstep our duty by undertaking to evaluate the evidence according to our own notions of the public interest, we would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation had been made in accordance with the mandate of Congress. (Emphasis supplied)

* * *

"We do not minimize the complexity of the

task the Commission faces in evaluating and balancing the numerous considerations that collectively determine where the public interest lies in a particular situation. And *we do not suggest that the National Transportation Policy is a set of self-executing principles* that inevitably point the way to a clear result in each case. On the contrary, those principles overlap, and may conflict, and where this occurs, resolution is the task of the agency that is expert in the field. But there is here no indication in the Commission's findings of a conflict of policies. * * * Nor has the Commission properly evaluated the advantages urged by the supporting witnesses to determine whether the standard of public convenience and necessity has been met." (Emphasis supplied)

Appellants cite *American Trucking Ass'n. v. United States*, 344 U.S. 298, but without application (Juris St. p. 9). Therein the Association and others attacked I.C.C. rules promulgated in 52 M.C.C. 675 to govern the lease and interchange of motor vehicles by motor carriers. The Commission's rules were affirmed and found not to be in violation of the national transportation policy (313-314), this Court saying:

"Regulation under the Act is there declared (49 U.S.C. preceding Sec. 1) to be in the interests of the preservation of the inherent advantages of all modes of transportation, and of an economically sound, safe, and efficient industry. See *United States v. Rock Island Motor Transit*, 340 U.S. 419, and *United States v. Texas & Pacific Motor Transport*, 340 U.S. 450. But no overly-nice distinction between law and policy is needed to support the view that the question is hardly one for the courts; it is clear that the rules represent, at best, a compromise between stability and flexibility of industry conditions, each alleged to be in the national interest, and we can only look to see if the Commission

has applied its familiarity with transportation problems to these conflicting considerations."

This case, then, does not say that in such matters the Commission must measure its findings and conclusions with specific references to the national transportation policy.

Cited also (Juris. St. p. 8) is *King v. United States*, 344 U.S. 254, a rate case in which this Court affirmed the Commission's prescription of intrastate railroad freight rates, and in which the Commission had given weight to passenger revenue deficits. This Court said:

> "Sec. 15 a (2) of the Interstate Commerce Act and the National Transportation Policy of 1940 reflect this broad concept of the unity of the nation's transportation system. They direct the Commission to consider, among other things, the need, in the public interest, of adequate and efficient railway transportation service and the need of revenues sufficient to sustain such service. *It permeates* such general revenue proceedings * * *." (Emphasis supplied).

Nor in this case did the Court say or imply that the Commission must measure the national transportation policy, in specific words, with each factor considered or finding made by it.

Alabama G. S. R. Co. v. United States, 340 U.S. 216, is also cited without discussion. (Juris. St. p. 8). This case put before the Court the question of failure of the Commission to make a finding that barge-rail costs were lower than all-rail costs, in ordering certain rail and barge line carriers to establish joint through rates and routes and prescribing differentials. The Commission

was sustained, this Court holding that the prescription of differentials does not deprive the appellant railroads of their inherent advantages contrary to the national transportation policy. But the case's holding nowhere states nor implies that the national transportation policy must be related in specific terminology to the Commission's findings.

Nor does *United States v. Rock Island Motor Transit,* 340 U.S. 419 (Juris. St. p. 8) mandate the identification of each fact, finding, or conclusion to the national transportation policy in specific terms. It simply holds that under the terms of this policy and of Sec. 5[9] the Commission has the right to make further limitations, restrictions, or modifications in a certificate granted to a rail-owned motor carrier, and "when competition, public interest in the preservation of the inherent advantages of rails and motors, and use of motor service by railroads in their operations are the basis * * * for allowing acquisitions of motor routes by railroads * * * ." (434-435)

But what does appear to be decisive on this question is *Luckenbach Steamship Co. v. United States,* 122 F. Supp. 824, affirmed in 347 U.S. 984. The holding of the case is: The Commission is not required to discuss each consideration expressed in the national transportation policy in every decision it renders although such policy must serve as a guide in all its decisions.

The basic findings essential to the validity of a

[9]Involving acquisitions and mergers.

given order will vary with the statutory authority invoked and the context of the situation presented. It is only necessary that the essential basis of the Commission's order appear in its report so that a Court can satisfy itself that the administrative function has been properly performed. The case was an action by Luckenbach to enjoin an order of the I.C.C. that granted a certificate of convenience and necessity to the Isbandtsen Company.

The Court quoted the national transportation policy from 49 U.S.C., preceding Section 1. It then made the following statement:

> "It is clear that this expressed Policy must serve as a guide to the Commission in all its decisions. *United States v. Great Northern R. Co.*, 343 U.S. 562, 576; *McLean Trucking Co. v. United States*, 321 U.S. 67, 82-84. However, it seems equally clear that the Commission cannot and *should not be required to discuss each consideration expressed in the National Transportation Policy in every decision it renders.* The basic findings essential to the validity of a given order will vary with the statutory authority invoked and the context of the situation presented. *Ala. Great S. R. Co. v. United States*, 340 U.S. 216, 288. *It is only necessary that the essential basis of the Commission's order appear in the report* so that a court can satisfy itself that the Commission has performed its function. See *Newtex S. S. Co. v. United States*, 107 F. Supp 388, affirmed 344 U.S. 901; *Capital Transit Co. v. United States*, 97 F. Supp. 614, 621. (Emphasis supplied)

Thus it would seem quite clear that in certificate cases involving the issue of public convenience and necessity (an ultimate issue) the Commission is neither

directed nor required to specifically relate its findings to the national transportation policy, in so many words, as it determines the primary or ultimate issue of public convenience and necessity. Such a conclusion would seem to nullify the meaning and primacy of Section 207 (a).

The matter reverts back to the Court's conclusion in the *Luckenbach* case, supra, that in the context of the total order it is only necessary that the Commission make basic findings essential to the validity of its order so that the Court may be satisfied that the Commission has performed its function. And in the instant order the Commission said: "We have, of course, constantly kept in mind our responsibilities under the national transportation policy." (p. 765)

II.

Appellants next jump to a proffered violation of due process on the erroneous assumption that the Commission has predicated its findings and conclusions upon evidence not of record (Juris. St. p. 8-11). In support of this contention three rate cases were cited (Juris. St. p. 8).

In *North Carolina v. United States*, 325 U.S. 507, the Commission apparently ignored basic evidence adduced in a rate hearing, upon which findings should have been made.

United States v. Chicago M. St. P. & P., 294 U.S. 499 reversed an I.C.C. order disapproving reduced rates

proposed by the railroad, on grounds that the Commission's order left it up to the Court to choose between conflicting inferences and should therefore have been made more precise. This Court said: "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." (511)

Robinson v. Baltimore & Ohio Rr. Co., 222 U.S. 506, simply held that no action for reparation for exactions for railroad freight payments could be maintained in any court in the absence of an appropriate finding and order of the I.C.C. The plaintiff therein failed because the complaint did not show that a complaint as to the rate schedule had been filed with the Commission or that the Commission had held it to be discriminatory.

Thus, none of the above cases would seem to be particularly on the point here urged by appellants. For the Commission did, in the EVERTS and INLAND cases, consider hundreds of pages of evidence adduced, make numerous findings therefrom, and did reach definite, unequivocal conclusions.

Other cases cited (Juris. St. p. 9-10) to the effect that findings made without evidence are arbitrary and baseless are good law, when applicable. But appellants' point is lost for lack of a basis in the instant case. That there was adequate evidence underlying each and every finding made by the Commission is evident from the Order attacked, and also found to be so by the reviewing District Court. After forty-four pages reviewing the evidence submitted, the Commission said:

> "To this end we have heretofore reviewed in some detail the supporting evidence as well as that

of the opposing carriers presented in each of the proceedings and have indicated the needs which exist for additional transportation facilities in the several areas involved." (page 761)

Again, at page 762, the Commission said:

"'In reaching these conclusions, we have given separate consideration to the evidence presented in each proceeding and to the arguments and contentions of the parties therein. * * * In arriving at our conclusions as to a need for the service of each applicant, we have, of course, taken into consideration the operating authorities and ability to serve of existing carriers."

Surely neither side could complain of such full and fair treatment.

In their Petitions to the Commission for Reconsideration of the EVERTS and INLAND grants made by Division 1, the appellants made the same allegation as that now made before this Court. The Commission thereafter, by order of March 24, 1958, "reopened these cases for reconsideration on the present records." The Commission obviously took this point seriously, for besides the recitals made (above), it had previously said:

"*One of the contentions* raised in the petitions *is that the division,* in reaching its conclusions in one or more of the proceedings, *used the evidence adduced in other of the cases.* In the circumstances, we will discuss the evidence presented in each proceeding by the applicant and opposing carriers, either separately or together in properly related cases,[5] and follow such discussion by evidentiary findings with respect to the need shown for additional motor service in the light of the shipper testimony and the existing transportation facilities. Having made these determinations, we then will

ascertain which of the applicants shall be authorized to provide the required service. Where operating authority of a carrier is described, it is limited to that pertinent to the matter at hand.

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[5]As Everts, Inland, and Pacific support one another's applications, we shall discuss these proceedings together."[6]

In the light of these repeated assertions by the Commission as to the separate consideration it gave to each of the applications, on their own merits, appellants' second argument seems wholly deflated. It is patent from a reading of the Commission's detailed and lengthy report on reconsideration that it did give separate consideration to each application.

If, for the sake of argument, it could even be assumed that in dealing with such complex problems with the expertise afforded it by the Congress, the Commission did take a long and careful look at the broad matters before it in the final stage of forming its judgment, this Court has spoken clearly, saying in *United States v. Pierce Auto Lines*, 327 U.S. 515 at 529:

> "In the absence of any showing of specific prejudice, the claim comes down to the highly technical objection that the Commission, *in the final stage of forming its judgment*, could not in either case take count of what had been done to the other, notwithstanding the closely related character and objects of the applications and the prior proceedings. * * * Obviously it would be consistent neither with good sense nor, we think with the type of hearing assured by the statute to force the Commission to put on such complete blinders * * *

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[6]78 M.C.C. 720—emphasis supplied.

and, given that the report contains all the essential findings required (citing case) the Commission is not compelled to annotate to each finding the evidence supporting." (Emphasis supplied)

III.

Appellants next complain that the Commission altered the standards used in deciding the EVERTS and INLAND applications[1] (Juris. St. pp. 3, 11).

Well established is the presumption that an administrative agency such as the Interstate Commerce Commission has properly performed its official duties, and this presumption will support its acts in absence of clear evidence to the contrary. This Court thus said in *Interstate Commerce Commission v. Jersey City*, 322 U.S. 503, a case involving the validity of a Commission order respecting rates:

> "The Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity and he who would upset the rate order under the act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." (512)

There are numerous cases to this effect, such as: *United States v. Chemical Foundation*, 272 U.S. 1, 14-15; *Baltimore & Ohio R. R. v. United States*, 298 U.S. 349.

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[1] This apparently does not apply with respect to the other seven applications disposed of in the same order, as appellants did not bring them in for judicial review even though they include grants of authority dwarfing either of those given to Everts or Inland.

358-359; and *Federal Power Com'n. v. Hope Gas Co.*, 320 U.S. 591, 602.

Even so, the Commission did go to great length in its disposition of the EVERTS and INLAND cases. It considered in detail the substantial evidence adduced in both records (pp. 720-731); it considered the improved services that would ensue from the joint efforts of INLAND, EVERTS, and PACIFIC (pp. 721, 734, 763-764); and made detailed findings on the ultimate issues involved in these two applications at pp. 734-735, 761-768.

In the instant case, no question is raised by the appellants with respect to the Commission's finding of fitness of the applicants. The attack is limited to the Commission's findings on the second test under section 207 (a), namely, its determination that public convenience and necessity requires the services authorized to EVERTS and INLAND. In matters concerning the grant or denial of a certificate of public convenience and necessity the extent of the Commission's authority has been considered many times and is well settled.

Interstate Commerce Commission v. Parker, 326 U.S. 60, provides an oft-quoted interpretation of the term "public convenience and necessity" as used in section 207 (a), at page 65 as follows:

> "Public convenience and necessity is not defined by the statute. The nouns in the phrase possess connotations which have evolved from a half-century experience of the government in the regulation of transportation. * * * *The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor carrier service*

would serve public convenience and necessity. Cf. *Powell v. United States*, 300 U.S. 276, 287. *This, of course, gives administrative discretion to the Commission,* Cf. *McLean Trucking v. United States*, 321 U.S. 67, 87-88, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances. * * * " (Emphasis supplied)

In *United States v. Detroit & Cleveland Navigation Co.*, 326 U.S. 236, this Court stated (at 241):

" * * * The Commission is the guardian of the public interest in determining whether certificates of public convenience and necessity shall be granted. For the performance of that function *the Commission has been entrusted with a wide range of discretionary authority. I.C.C. v. Parker*, 326 U.S. 60. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment to determine from its analysis of the total situation on which side of the controversy the public interest lies. Its doubt that the public interest will be adequately served if resumption of service is left to existing carriers is entitled to the same respect as its expert judgment on other complicated transportation problems. See *Chesapeake & Ohio R. Co. v. United States*, 283 U.S. 35, 42; *Alton R. Co. v. United States*, 315 U.S. 15, 23. *Forecasts as to the future are necessary to the decision.* But neither uncertainties as to the future nor the inability or failure of existing carriers to show the sufficiency of their plans to meet future traffic demands need paralyze the Commission into inaction. It may be that the public interest requires that future shipping needs be assured rather than left uncertain. The Commission has the discretion so to decide. It went no further here." (Emphasis supplied)

In the 1957 case of *Schaffer Transportation Co. v.*

United States, 355 U.S. 83 this Court reiterated these principles, saying at page 88:

> "Of course, the Commission possesses 'a wide range of discretionary authority' in determining whether the public interest warrants certification of any particular proposed service. *United States v. Detroit & C. Nav. Co.*, 326 U.S. 236, 241; *Interstate Commerce Comm'n v. Parker*, 326 U.S. 60."

Thus appellants' argument that the Commission "changed the rules in the middle of the game" are without merit in fact or law.

In *Interstate Commerce Commission v. Union Pacific*, 222 U.S. 541; and *Virginian Rwy. v. United States*, 272 U.S. 658, 665-6; this Court has held that the consistency of the Commission's findings with those made by it in other cases are matters for the Commission alone. In the *Virginian Rwy. Case* (supra) this Court said:

> " * * * To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province." (663)

Reference may also be made to two of appellants' citations: *American Trucking Ass'ns v. United States*, 344 U.S. 298 at 314, where this Court said

> " * * * The mere fact that a contrary position was taken during the war years when active interchange and leasing were required, that the Commission has never before restricted trip-leasing and has in fact approved it from time to time, does not change our function."

and *King v. United States*, 344 U.S. 254, where at page

262 it will be noted that in prescribing railroad freight rate levels the Commission changed its policy and considered the effect of passenger revenue deficits on overall operations and gave weight thereto in making its freight rate prescription.

Appellants may really be complaining of the size of the territorial grants made (Juris. St. p. 10), in that all ten cases involved the area of eleven western states and part of Texas. But the EVERTS' grant involved parts of only three states, and INLAND'S affected the area of parts of only four states. No complaint is made of other grants, such as to:

Pacific Truck Service, Inc.—part or all of five states;

Pacific Intermountain Express Co.—part or all of six states;

Collett Tank Lines (owned by Pacific Intermountain Express)—part or all of eight states;

W. S. Hatch Co.—part or all of nine states;

Clark Tank Lines Company—part of all of nine states;

Canlay & Tanzola, Inc.—part or all of nine states; and

Consolidated Freightways, Inc.—part or all of seven states.

Even so, the above are not unusual grants. The Commission has made many as large or larger in both bulk commodity and territorial scope. For example, only a few are mentioned to demonstrate that there has been no policy change made in the instant grants:

In *York Interstate Tkg. Extension—Chemicals*, 68 M.C.C. 687, twenty-eight state authority was granted

for bulk acids, chemicals, and coal tar products; in *Miller Motor Line of N. C.*, 68 M.C.C. 196, broad acid and chemical authority was granted within the area of six states; and in *Sprout & Davis—Liquid Chemicals*, 69 M.C.C. 507, a broad chemical grant was provided applicant over a 12-statewide area. Other broad grants have been made in recent years by the Commission in such instances as *J. Tom Miller Ext.—Texas*, 68 M.C.C. 543; *Watkins Motor Lines Ext.—Southern States*, 68 M.C.C. 409; *Miller Extension*, 21 M.C.C. 401; *Chambers Ext.—Liquid Commodities*, 69 M.C.C. 347; and many, many others—which indicate that America's economy, traffic, and distribution continues to grow and the Commission is made well aware of it in cases such as these.

IV.

Appellants' fourth question is similar to the second (Juris. St. p. 3) except that it is expressed in the classic terms used to urge judicial review. Unfortunately it is premised on the erroneous assumption that the Commission's findings and conclusions are not supported by substantial evidence of record. Response to this proposition has been rather fully made above under part II of this Argument, to which reference is respectfully made.

It is settled that the Commission adequately performs its duty to make findings if its order enables a reviewing court to ascertain how the Commission reached its ultimate conclusion and if its findings afford a ration-

al basis for the ultimate conclusion. *United States v. Chicago, M. St. P. & P. R.*, 294 U.S. 499, 510-11; *Mississippi Valley Barge Co. v. United States*, 292 U.S. 282, 286-87; *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 164. As this Court put it in the *Mississippi Valley Barge Case* (supra):

> "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

The District Court unanimously found an abundance of substantial evidence, Commission findings in accord therewith, and that the Commission's ultimate conclusion was rationally and lawfully correct.

With substantial evidence before it the Commission has exercised that expert judgment and discretion vested in it by the Congress and the Court, under the Act. It took note, not only of applicants' interests, but primarily of the interests of the public. It found from the evidence that the acid and chemical industry of the West Coast had grown and was continuing in a rapid rate of growth, thus creating new products, new trade movements, new uses, new customers, new plants, and greater transportation needs. It viewed the practical impossibility of these needs being properly and adequately handled by the present trucking facilities without providing much broader operating authorities to those carriers who had already demonstrated a genuine interest in providing the public such services.

In the Everts case: 556 pages of testimony, 42 exhibits offered and 41 received; in the Inland case, 1,278 pages of testimony, 76 exhibits offered and 75 received.

The Commission found little or no chance for impairment, and it was not willing that the public interest be left subservient to the static conditions of an inadequate transportation facility which would stifle the economic growth and welfare of the Pacific Coast's chemical industry and the satellite interests such an industry generates.

Thus the Commission correctly concluded from the evidence before it:

> That the additional services proposed by EVERTS and INLAND would serve useful purposes responsive to public demand;
>
> That such purposes would not be served as well by existing carriers; and
>
> That these purposes would be served by applicants without endangering or impairing the operations of other carriers contrary to the public interest.

This is the time-tested yardstick by which the Commission has measured its certificate problems. (*Kenosha Auto Transport Corp. Extension*, 49 M.C.C. 838; *Pan American Bus Lines Operations*, 1 M.C.C. 190; *Brady Transfer & Sto. Extension*, 47 M.C.C. 1; *Squaw Transit Co.*, 48 M.C.C. 17; *Tristate Transit Co. of Louisiana*, 29 M.C.C. 381; *Spencer Extension*, 29 M.C.C. 73; *Sullivan Extension*, 34 M.C.C. 157; *Chief Refrigerator Truck Lines, Inc.*, 34 M.C.C. 482; *and Santa Fe Trail*, 41 M.C.C. 713).

It is therefore submitted that the Commission's

orders in the EVERTS and INLAND cases were based on findings logically dictated by substantial evidence contained within the records taken.

CONCLUSION

For the foregoing reasons we submit, then, that the decision below is correct and that this appeal presents no substantial question. The judgment of the District Court should accordingly be affirmed.

Respectfully submitted,

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Portland 1, Oregon,
Attorney for Appellee,
Everts' Commercial Transport,
Inc.

September, 1959

CERTIFICATE OF SERVICE

I Earle V. White, attorney for Everts' Commercial Transport, Inc., one of appellees herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 18th day of September, 1959, I served copies of the foregoing Motion to Affirm on the several parties to this appeal, as follows:

1. On the appellants, by mailing copies, in duly addressed envelopes, with first-class postage prepaid, to John M. Hickson, Esq., 1225 Failing Building, Portland, Oregon; William B. Adams, Esq., 331 Pacific Building, Portland, Oregon; and, with airmail postage prepaid, to Bryce Rea, Jr., Esq., Munsey Building, Washington 4, D. C.

2. On the United States of America, appellee, by mailing copies, in duly addressed envelopes with airmail postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C., and John H. D. Wigger, Esq., Anti-trust Division, Department of Justice, Washington 25, D. C., and by first-class postage prepaid to Clarence E. Luckey, Esq., United States Attorney, U. S. Court House, Portland, Oregon.

3. On the Interstate Commerce Commission, appellee, by mailing a copy in duly addressed envelope, with airmail postage prepaid, to Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C.

4. On Inland Petroleum Transportation Company, Inc., appellee, by mailing a copy in duly addressed en-

velope with first-class postage prepaid, to Albert E. Stephan, Esq., 711 Center Building, Seattle 4, Washington.

EARLE V. WHITE

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 337

ST. JOHNS MOTOR EXPRESS CO., APPELLANT, AND JAMES J. WILLIAMS, INC., AND CONSOLIDATED FREIGHTWAYS, INC., INTERVENING APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE, AND INTERSTATE COMMERCE COMMISSION, EVERTS' COMMERCIAL TRANSPORT, INC., AND INLAND PETROLEUM TRANSPORTATION COMPANY, INC., INTERVENING APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

This is a direct appeal from the judgment of a three-judge court which sustained an order of the Interstate Commerce Commission awarding certificates of public convenience and necessity to Everts Commercial Transport, Inc. (Everts) and Inland Petroleum Transportation Company, Inc. (Inland).

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During 1955 and 1956, ten motor carriers, including Everts, Inland, and the intervening appellant, Consolidated Freightways, Inc. (Consolidated), separately applied for Commission authorization to engage in tank truck transportation of chemicals in various areas in the twelve westernmost States. Although the applicants filed independently, the requested commodity and geographical authorizations overlapped considerably. After hearings on each application, several examiners' reports were filed. The examiner who had presided at the separate hearings involving the Everts and Inland applications recommended their denial. On exceptions to the various examiners' opinions, the Commission's Division 1 issued a consolidated report on all of the applications (except that of Consolidated), which, *inter alia*, granted the applications of Everts and Inland (72 M.C.C. 599). The full Commission, on reconsideration, affirmed, with minor modifications not here relevant, and also granted the Consolidated application (78 M.C.C. 717).[1]

In a *per curiam* opinion, the district court affirmed, adopting as its own the Commission's findings and conclusions pertinent to the Everts and Inland applications and declaring them to be "amply supported" by the evidence (J.S. 15–16).

1. Appellants' principal contention is that the Commission failed to consider or make required findings as to whether the grant of additional operating authority to Everts and Inland would impair the operating abil-

[1] For the Court's convenience, additional copies of the Commission's report are being lodged with the Clerk.

ity of existing carriers and thus fail to "promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation among the several carriers" as required by the National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901, 1001.

We stress, at the outset, that there is no requirement that the Commission, in passing upon common carrier applications filed under Section 207 of the Interstate Commerce Act (49 U.S.C. 307), couch its ultimate findings and its conclusions in the express terms of that Policy.[2] See *United States* v. *Detroit Navigation Co.*, 326 U.S. 236, 240–1; *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 522, 530–532. *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83, stands merely for the proposition that the Commission's report must show that its order has a rational basis when viewed in light of the statutory criteria.

The Commission is, of course, required to *consider* the National Transportation Policy in any licensing

[2] In contrast, § 209 (49 U.S.C. 309), dealing with certification of motor *contract* carriers, expressly requires findings in terms of the National Transportation Policy.

[3] See also, to the same effect, *Dickinson Transfer and Storage Co.* v. *United States*, 42 F. Supp. 215, 218–219 (E.D. Pa.), affirmed, 317 U.S. 587; *North Coast Transportation Co.* v. *United States*, 54 F. Supp. 448, 451 (N.D. Cal.), affirmed, 323 U.S. 668; *Beard-Laney, Inc.* v. *United States*, 83 F. Supp. 27, 31–32 (E.D.S.C.), affirmed, 338 U.S. 803; *Norfolk Southern Bus Corp.* v. *United States*, 96 F. Supp. 756, 760–761 (E.D. Va.), affirmed, 340 U.S. 802; *Southern Kansas Greyhound Lines* v. *United States*, 134 F. Supp. 502, 506–509 (W.D. Mo.), affirmed, 351 U.S. 921; and *Luckenbach Steamship Co.* v. *United States*, 122 F. Supp. 824, 827–829 (S.D.N.Y.), affirmed, 347 U.S. 984.

proceeding. See, *e.g.*, *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 82–84, 86–87; *Schaffer Transportation Co.* v. *United States*, *supra*. But the Commission here expressly stated in its report that it had "constantly kept in mind our responsibilities under the national transportation policy" and that "it goes without saying that the purposes of the policy must be considered in all proceedings of the character here presented" (78 M.C.C. 717, 765). Examination of other portions of the report reveals that the Commission, with respect to both the Everts and Inland applications, considered not only the applicants' qualifications (78 M.C.C. at 721, 726) and the shippers' needs for the proposed services (78 M.C.C. 721–723, 726–730), but also the alleged effect of granting these applications upon the opposing carriers, including appellant St. Johns and intervening appellants Williams and Consolidated (78 M.C.C. 723–726, 730–731). "On the basis of the evidence adduced in the Everts [and] Inland * * * proceedings," the Commission concluded that existing carriers could not meet the needs of the shippers and that the certificates awarded to Everts and Inland were, therefore, required by the public convenience and necessity (78 M.C.C. at 734–735, 763–764).

In the *Pierce Auto Lines* case, *supra*, this Court, rejecting a claim that grant of both of two carriers' applications was defective because the Commission had not made express findings "that there was a need for two through-line operations which would be in competition with one another", stated (327 U.S. at 530, 532):

> * * * there are two obvious answers. One is that the Commission, in making the separately stated findings, could not have been oblivious to the competitive consequences of its order or the relation of those consequences to the public interest. The other is that those findings, read in the light of the report, adequately and expressly cover the element of public convenience and necessity, including the competitive factors which the Commission inescapably had in mind. Only the most hypercritical reading of the findings, and one which ignores the report's explicit statements in many respects, could construe them as meaning only that *each* operation was required by public convenience and necessity without any regard to the competitive consequences of granting *both*. The Commission should not be required to rewrite its report simply to say, redundantly we think, that *both* operations, as well as each, are required by public convenience and necessity.

2. Appellants also urge that the Commission, in consolidating the ten applications and disposing of them in a single report, improperly considered evidence not of record in the Everts and Inland proceedings when it approved their respective applications. However, they point to no specific finding based on evidence not in the Everts or Inland records. Moreover, the report reveals that the Commission carefully considered the individual merits of each application and gave the several applications only such joint consideration as was obviously appropriate and required by the common questions they presented. See *United*

States v. Pierce Auto Freight Lines, supra, 327 U.S. at 529–530.

The Commission expressly referred in its report to contentions that Division 1, in deciding some of the proceedings before it, had used the evidence adduced in other cases (78 M.C.C. at 720). It stated that, as a matter of general policy, it would consider the evidence and reach its conclusions with respect to each applicant separately (*ibid.*). It made an exception, however, in the case of the applications filed by Everts, Inland and another applicant, Pacific Truck Service, to which it gave some joint consideration in view of the fact that these three applicants supported one another by proposing "to augment their individual capacity to provide service, if the need arises, by sharing equipment and terminal facilities" (*id.* at 721).

Even with respect to these three applicants the Commission set out separately the proposals and qualifications of each applicant, the evidence as to the need for its proposed service, and the contentions of the opposing carriers (*id.* at 720, 726, 731). And although the Commission, after analyzing the individual merits of each application, also discussed and made conclusions on certain "common issues presented [by the applications] as a whole (*id.* at 762), it again stressed that "[i]n reaching these [common] conclusions, we have given separate consideration to the evidence presented in each proceeding and to the arguments and contentions of the parties therein" and that "[i]n arriving at our conclusions as to a need

for the service of each applicant, we have, of course, taken into consideration the operating authorities and ability to serve of existing carriers" (78 M.C.C. 762). It is clear, therefore, that the Commission in this case acted with the utmost circumspection to segregate the individual and group aspects of the problem before it, and that the procedure it followed was appropriate.

3. Appellants complain of an alleged shift in policy by the Commission, which they purportedly had no opportunity to meet. However, they show no such change in the standards applied for determining whether grant of an application would serve the public convenience and necessity. The areas of certification (particularly with respect to some of the grantees other than Everts and Inland) are extensive, but the Commission has made as broad or broader awards in a substantial number of other proceedings. Nor is there anything unique in the consideration given to the grant of services to compete with the "virtual monopoly in the transportation of chemicals in the four Pacific Northwest States" which St. Johns previously enjoyed (78 M.C.C. at 734).

Finally, it is clear that, to the extent appellants are contending (J.S. 12) that the Commission's "policy shift" is reflected in the alleged failure to place the burden on the appellants to demonstrate the need for their proposed service or its alleged failure to consider the impact of the grants upon existing carriers (see pp. 2–5, *supra*), they are merely arguing the evidentiary questions which the court below expressly resolved against them. The Commission, in fact, applied settled criteria in determining that the Everts

and Inland applications should be granted, and it did so upon the basis of clearly substantial evidence of record. Appellants have shown nothing to the contrary.

CONCLUSION

It is respectfully submitted that the appeal presents no substantial question warranting further review and that the judgment of the district court should be affirmed.

Respectfully submitted.

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OCTOBER 1959.

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No. 337

In the Supreme Court of the United States

October Term, 1959

ST. JOHNS MOTOR EXPRESS CO.,
JAMES J. WILLIAMS, INC., and
CONSOLIDATED FREIGHTWAYS, INC.,
Appellants,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees

On Appeal from the United States District Court for the District of Oregon

REPLY TO MOTIONS TO AFFIRM

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In the Supreme Court
of the United States

OCTOBER TERM, 1959

No. 337

St. Johns Motor Express Co., *Appellant*, and James J. Williams, Inc., and Consolidated Freightways, Inc., *Intervening Appellants*,

v.

United States or America, *Appellee*, and Interstate Commerce Commission, Everts' Commercial Transport, Inc., and Inland Petroleum Transportation Company, Inc., *Intervening Appellees*.

REPLY TO MOTIONS TO AFFIRM

The Appellees have filed motions to affirm under Rule 16, paragraph 1 (c) the Revised Rules of this Court.

The intervening Appellees appear to have misconstrued this rule. It reads as follows:

> "(c) The Court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

Under the rule, it would appear that contentions relative to the history of the motor carrier litigants, and allegations of equity, as dwelt on by intervening Appellees are amiss, as likewise would a reply by us to those contentions and allegations.

The intervening Appellants also place reliance upon a contention that the single judge in denying Appellant's motion for a temporary restraining order passed upon all elements of this appeal. While we disagree with this contention, yet arguendo it is beside the point. The single judge had no authority to pass upon the merits of the proceeding, but could pass only upon the propriety of the issuance of the temporary restraining order. See 28 U.S.C.A. 2325, 2284. In *Ex Parte Metropolitan Water Co.*, 220 U.S. 539 (also 31 S. Ct. 600, 55 L. Ed. 575), it was held at 545:

> "Congress having declared that the merits of the application for an interlocutory injunction, such as that applied for in the case with which we are concerned, should be considered and determined by a tribunal consisting of three judges constituted as provided in the act, it results that a tribunal not so constituted did not possess jurisdiction over the subject-matter of the right of such injunction."

See also *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.*, 258 U.S. 377, 42 S. Ct. 349, 66 L. Ed. 671; *Ex Parte Northern Pacific R. Co.*, 280 U.S. 142, 144; *Stratton v. St. L. S. W. Ry. Co.*, 282 U.S. 10,15.

This is not an appeal from the denial of a temporary restraining order by the single judge, but from the judgment of the three-judge court sustaining an order of the

Interstate Commerce Commission, as set forth in the Jurisdictional Statement, Appendix A, page 15.

The attempt to allege that the single judge passed upon the questions raised on this appeal is not only erroneous from its content, but even if so, would not correct the failure of the duly constituted court to do so.

Turning to the sole question of whether this appeal involves substantial or unsubstantial questions, we were unable to locate many decisions on the precise point.

In *Herzog v. United States;* 75 S. Ct. 349, the proceeding involved the allowance of bail and the consequent determination of the meaning of "substantial question." Mr. Justice Douglas, sitting as a Circuit Justice, held at page 350:

> "When, therefore, the issue is whether a 'substantial question' is presented within the meaning of Rule 46(a) (2), the first consideration is the soundness of the errors alleged. Are they, or any of them, likely to command the respect of the appellate judges? It is not enough that I am unimpressed. I must decide whether there is a school of thought, a philosophical view, a technical argument, an analogy, an appeal to precedent or to reason commanding respect that might possibly prevail. If the question were one presented by a petition for certiorari to this Court and I were asked to grant a stay, I would grant it despite my own convictions on the merits, once I felt that any of my Brethren would be impressed with the argument. Though there were only one likely protagonist of that view on the Court, I would feel that the question should be saved for decision by the entire bench. The fact that one judge would be likely to see merit in the contention is likewise enough to indicate its substantiality for the purpose of Rule 46(a) (2). * * *"

"Substantial question" has been defined in many cases as a "debatable" question. See *D'Aquino v. U. S.*, 180 Fed. (2d) 271; *U. S. v. Barbeau*, 92 Fed. Supp. 196; *Brandt v. U. S.*, 110 Fed. Supp. 623, 627.

It is true that the cases cited relate to the definition of "substantial question" as contained in a rule of criminal procedure. However, they were the best legal sources to throw light upon the definition of "unsubstantial question." Academically, the holding of the cited cases is sustained. Both Webster's International Dictionary and the courts hold that "unsubstantial" means "not substantial," or "wanting matter of substance."

Rule 16, paragraph 1(c) is a relatively new rule. There have been no decisions, that we could find, defining the phrase "unsubstantial question" as therein contained. It would appear that this proceeding would give the Court an opportunity to define the subject phrase.

Turning to the contentions of the Appellees, it is apparent that they disagree with us. Their disagreement and their attempts of distinguishment establish that the questions presented by us are debatable.

1. The Appellees first concede that, "the Commission is, of course, required to consider the National Transportation Policy in any licensing proceedings" (pages 3-4 of Government Motion) and "admittedly, everything the Commission does must comply with the national transportation policy" (page 9 of intervenor Everts' motion).

They then seek to avoid their own concurrence by stating that the National Transportation Policy appears

in the Motor Carrier Act only with respect to contract carriers.

It is of interest to note that when the Transportation Act of 1940 (which included the National Transportation Policy) was enacted the words "and the national transportation policy declared in the Interstate Commerce Act" were substituted in Section 209(b) (Contract Carrier permit section), in lieu of the former language, to-wit: "and the policy declared in Section 202(a) of this part."

It can hardly be said that Congress meant by its mere substitution of words, necessitated by the concurrent repeal of Section 202(a) to emasculate and render nullatory the express words in the National Transportation Policy: "* * * All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 207 of the Motor Carrier Act (Sec. 307, 49 U.S.C.), the public convenience and necessity section, is inescapably a part of the Act and the Commission clearly erred in excusing its not making a finding by saying: "* * * Such a finding is appropriate only in granting motor contract carrier authority." (78 M.C.C. at page 764).

By such a view the Commission ignores the Congressional mandate that it foster and promote sound economic conditions in transportation among the several carriers and preserve a national transportation system. It is saying, in effect, that we are only required to adhere to the National Transportation Policy in operating

authority proceedings involving contract carrier applications.

It is apparent that (1) operating rights, be they those of railroad, water carrier, motor common carrier or motor contract carrier, and (2) rates, figuratively, and respectively, comprise the backbone and the body of transportation regulation. Yet, the Commission and the Appellees, relative to the procurement of operating authority, would only apply the National Transportation Policy to motor contract carriers.

This Court in *Texas & New Orleans R. R. Co. v. Northside Belt Ry. Co.*, 276 U.S. 475, 479, 47 S. Ct. 361, 362, 72 L. Ed. 661, long ago pronounced the purpose of public convenience and necessity statutes in stating, page 479:

> " * * * The purpose of paragraphs 18 to 22 is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest. (Citing numerous cases)."

Here, the Commission thought so little of such purpose that it made no finding concerning it.

As if recognizing that their own argument lacks the qualities of soundness and persuasion, the Appellees next assert that the Commission did consider the National Transportation Policy and did make the requisite basic findings. To support this contention, they recite that the Commission said:

"We have, of course, constantly kept in mind

> our responsibilities under the National Transportation Policy."

Appellees rely upon such language of the Commission to meet the contention in our Jurisdictional Statement that the Commission "made no finding as to whether the grant of the additional authority would, or would not, have any effect upon the existing transportation system." (J. S. 7)

The Commission's mere assertion that it complied with the Congressional mandate is a mere claim on words and obviously is insufficient.

In *Atchison Ry. Co. v. U. S.*, 295 U.S. 201-202, this Court stated:

> " * * * This court will not search the record to ascertain whether by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order. In the absence of a finding of essential basic facts, the order cannot be sustained: *Florida v. United States*, 282 U. S. 194, 215. Recently, this Court has repelled the suggestion that lack of express finding by an administrative agency may be supplied by implication. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433. See *Beaumont, S. L. & W. Ry. v. United States*, 282 U.S. 74, 86; *Interstate Commerce Commission v. Chicago, B. & Q. R. Co.*, 186 U.S. 320, 341."

In one of the cited cases, *Beaumont*, 282 U.S. 74, at page 86, the Court stated that the Commission' failure specifically to report the facts and make findings was just as much in error as if a lower court had similarly failed to make specific requisite findings.

See also *City of Yonkers v. U. S.*, 320 U.S. 685, 64 S. Ct. 327, 88 L. Ed. 400; *Colorado-Wyoming Gas Co. v. Federal Power Commission*, 324 U.S. 626, 65 S. Ct. 580, 89 L. Ed. 1235.

In the Order here under consideration, as stated, there is no finding as to what effect the grant of the authorities would have upon the maintenance of a sound transportation system. The state courts universally have recognized the necessity for some such conclusion as an element for public convenience and necessity certificates under state statutes. An extensive note covering decisions of the state courts on this question is to be found in 67 A.L.R. p. 957. The language of Section 207 of the Motor Carrier Act was taken virtually verbatim from the state statutes in existence at the time of the adoption of the Act. Concerning that language, Senator Wheeler, who had charge of the bill in the Senate, said this: "This is a provision which is in practically every State law at the present time. There was some objection to it, and a suggestion was made that we should not use the word 'future' in connection with 'public convenience and necessity', and that we should not use the words 'public convenience and necessity'. But those words have been adopted by almost every State in the Union where there is a law, they have been interpreted by the courts, and the committee felt that, while perhaps some other language might have been just as appropriate, nevertheless, that language having been construed by the courts, it would be unwise for the committee to write some other language in the law which would have to be passed upon by the courts." Congressional Record, Vol. 79, pt. 5,

p. 5653. (74th Cong. First Session.) The Commission itself has recognized the rule enunciated by the state courts, *Pan American Bus Company Application*, 1 M.C.C. 190, 203.

We cited several cases in our Jurisdictional Statement including *Schaffer Transportation Co. v. U. S.* 355 U.S. 83; *American Trucking Ass'n v. U. S.*, 344 U.S. 298; *King v. United States*, 344 U.S. 254; *Alabama G. S. R. Co. v. U. S.*, 340 U.S. 216; *United States v. Rock Island Motor Transport*, 340 U.S. 419, to support our position relative to our question or proposition 1 as set forth in our Jurisdictional Statement.

We nowhere asserted, and do not now assert, that the above specified cases or any others cited by us passed upon this precise question or proposition, which is:

> "1. Must the Interstate Commerce Commission consider, give weight to, make findings and discuss the National Transportation Policy, in public convenience and necessity proceedings, with respect to whether the proposed additional operating authorities, upon the evidence of record in each proceeding, would impair the ability to existing carriers to maintain a safe, adequate, economical and efficient service?"

We cited the subject cases to support our contention. We recognize that this Court has never to our knowledge, passed upon the precise question which we have presented. We are requesting this Court to pass upon this precise question. The cases cited are admittedly different on facts from those in the instant one, but were cited to establish by analogy that this Court, in

proceedings involving the National Transportation Policy, has uniformly required the Commission to make basic findings in accordance with that Congressional mandate.

The Appellees do not cite any decision reflecting that this Court has passed upon the application of the National Transportation Policy in the context here posed.

Their sole claim appears to be under the authority of *Luckenbach Steamship Co. v. United States*, 122 F. Supp. 824, affirmed per curiam 347 U.S. 984. They assert that the District Court there held that the Commission is not required to discuss *each* consideration expressed in the National Transportation Policy in every decision it renders, although they admit that the essential factors of that policy relating to the subject matter at hand must be followed. We have no disagreement with that assertion.

We agree that if the adversaries in the proceeding are not rival forms of transportation, i e., rail, motor, or water, but instead are solely either rail, motor, or water, the Commission is not required to consider, discuss, or make findings relative to the non-existent issue of the relative inherent advantages of rail, motor, or water carriers. Why discuss or make a finding relative to a factor which is non-existent? However, when the issue is, as was presented here from the beginning, the relation of the public interest to whether the authorization of additional services would impair existing services, the Commission should have made a finding. The *Luckenbach* case is not contrary to this position, but it is in support of it.

In the case relied upon by Appellees, the Court stated that the Commission need not make a finding concerning the national defense aspect of the National Transportation Policy, because the issue had not been raised. As stated, we agree, but as we likewise state, such was not the case here. The Commission in this proceeding failed to make a finding on a most prominent issue. It merely said, see supra, we do not have to make a finding relative to effect of the proposed grants upon existing carriers, although such was a predominant issue.

2. The Appellees next assert that the Commission did not consider evidence not of record in the *Everts* and *Inland* proceedings. However, they negate their statement by admitting (Government's motion, page 6) that the evidence of record in three separate proceedings was considered jointly. They justify this admission by asserting that the three applicant carriers, Everts, Inland and Pacific Truck, were supporting one another.

We stated in our Jurisdictional Statement, page 10, that the applications involved various numbers of witnesses, geographical areas and various but not uniform parties. These statements have not been denied or refuted. Clearly, the Commission could not escape the requirement of due process that nothing can be treated as evidence in a proceeding if not introduced in evidence in that proceeding, by saying since these carriers support one another we will treat their records together. The protesting carriers, who were not parties to one or more of the proceedings, and hence, were not participants to the evidence, could hardly have been said to have had their day in Court.

Furthermore, an examination of the report of the Commission, 78 M.C.C. 717, supplied by the Government as data supplementary to its motion, will reveal clearly that the majority of the Commission went outside of the individual records before it, in its ultimate finding and conclusion. For example, on pages 721-722 of its report (78 M.C.C.) the majority of the Commission sets forth the public evidence in the *Everts* proceeding. This evidence is succinctly summarized in the dissent of Commissioner Freas appearing at 78 M.C.C. 768, where he states:

> " * * * For example, in the Everts case, the report indicates that the four supporting shippers have specified only one point in Oregon, three points in Washington, seven points in California, and two points in Canada from which traffic may move. While it has generally been the practice in such instances to grant either point-to-point or point-to-area authority, as the case may warrant, nonradial authority is granted here to Everts between all points throughout California, Oregon and Washington. * * * "

While the majority of the Commission self-servingly asserts it considered only the evidence in each case, yet where did it have any substantial evidence in the *Everts* case, for example, upon which to predicate such a broad grant of authority?

3. In reference to the third question presented by Appellants, the Appellees merely state the Appellants "show no such change in the standards (of public convenience and necessity) for determining whether grant of an application would serve the public convenience and necessity" (Government's motion, page 7).

We reiterate that consistently prior to these proceedings the Commission itself had recognized (see Jurisdictional Statement 9) that it "must consider what effect, if any, an extension will have on present facilities and operating authorities (Jurisdictional Statement 9). Relying upon these factors, protestants in the *Everts* and *Inland* cases sought to develop the use by the shippers of their services and whether or not the respective shippers could state any reason why the existing services could not meet any present or foreseeable future need which such respective shippers had. The response to past use of the protestants by each shipper was negative. Likewise, the response from each shipper was uniform that he could not see any reason why protestants could not meet any present or reasonably foreseeable transportation need of his company, within the territory. The asking of these questions had long been the standard modus operandi by a protestant in public convenience and necessity proceedings. In the *Everts* and *Inland* cases the majority of the Commission abandoned and refused to give any effect to this long-established test, but instead, ignored such evidence of record.

It is significant that Appellee Everts, on page 29 of its motion, re-affirms these long-established criteria, which the majority of the Commission summarily abandoned for application in the *Everts* and *Inland* cases.

It is true as stated on page 7 of the Government's motion, that the Commission found that St. Johns enjoyed a virtual monopoly. However, such finding is at complete variance with the facts recited on pages

723-726 of the Commission's report (78 M.C.C.), where six existing motor carriers are identified. For some reason, the rail carrier protestants and their service were not identified, although of record.

4. The Government's motion does not refer to Appellant's fourth question relating to substantiality of supporting evidence. The intervening Appellees mention the point briefly.

In addition to what we have said in our Jurisdictional Statement, we refer to our argument, supra, in reference to the insufficiency of each record within its four corners to support the very broad grants of authority, which were made.

CONCLUSION

The questions presented by us are of far-reaching interest and consequence to the transportation industry, and to the public interest in the maintenance of the soundness of that industry. We respectfully hope that the Court will deny the motions to affirm and entertain this appeal in order that the Congressional mandate may be clarified in the context here presented.

It is respectfully submitted that the motions to affirm should be denied.

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October 15, 1959.

CERTIFICATE OF SERVICE

I, William B. Adams, one of the attorneys for the appellants, hereby certify that on the 15th day of October, 1959, I served copies of the foregoing **REPLY TO MOTIONS TO AFFIRM** on the several parties of this appeal, as follows:

1. On the United States of America, appellee, by mailing copies, in duly addressed envelopes and airmail postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C., and John H. D. Wigger, Esq., Anti-Trust Division, Department of Justice, Washington 25, D. C., and by first-class postage prepaid to Clarence E. Luckey, Esq., United States Attorney, U. S. Court House, Portland, Oregon;

2. On the Interstate Commerce Commission, appellee, by mailing a copy in duly addressed envelope, with airmail postage prepaid, to Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C.

3. On Inland Petroleum Transportation Company, Inc., appellee, by mailing a copy in duly addressed envelope with first-class postage prepaid, to Albert E. Stephan, Esq., 711 Center Building, Seattle 4, Washington, and on Everts' Commercial Transport, Inc., appellee, by mailing a copy in duly addressed envelope with first-class postage prepaid to Earle V. White, 2130 S. W. 5th Avenue, Portland 1, Oregon.

WILLIAM B. ADAMS